



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

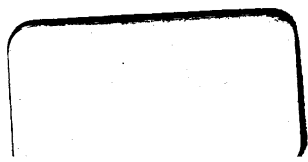
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



CZ
AE
XU



Wilson McCulloch
23/4

ESSAYS

ON THE

ACTION FOR MONEY

HAD AND RECEIVED,

ON THE

LAW OF INSURANCES,

AND ON THE

LAW OF BILLS OF EXCHANGE

AND

PROMISSORY NOTES,

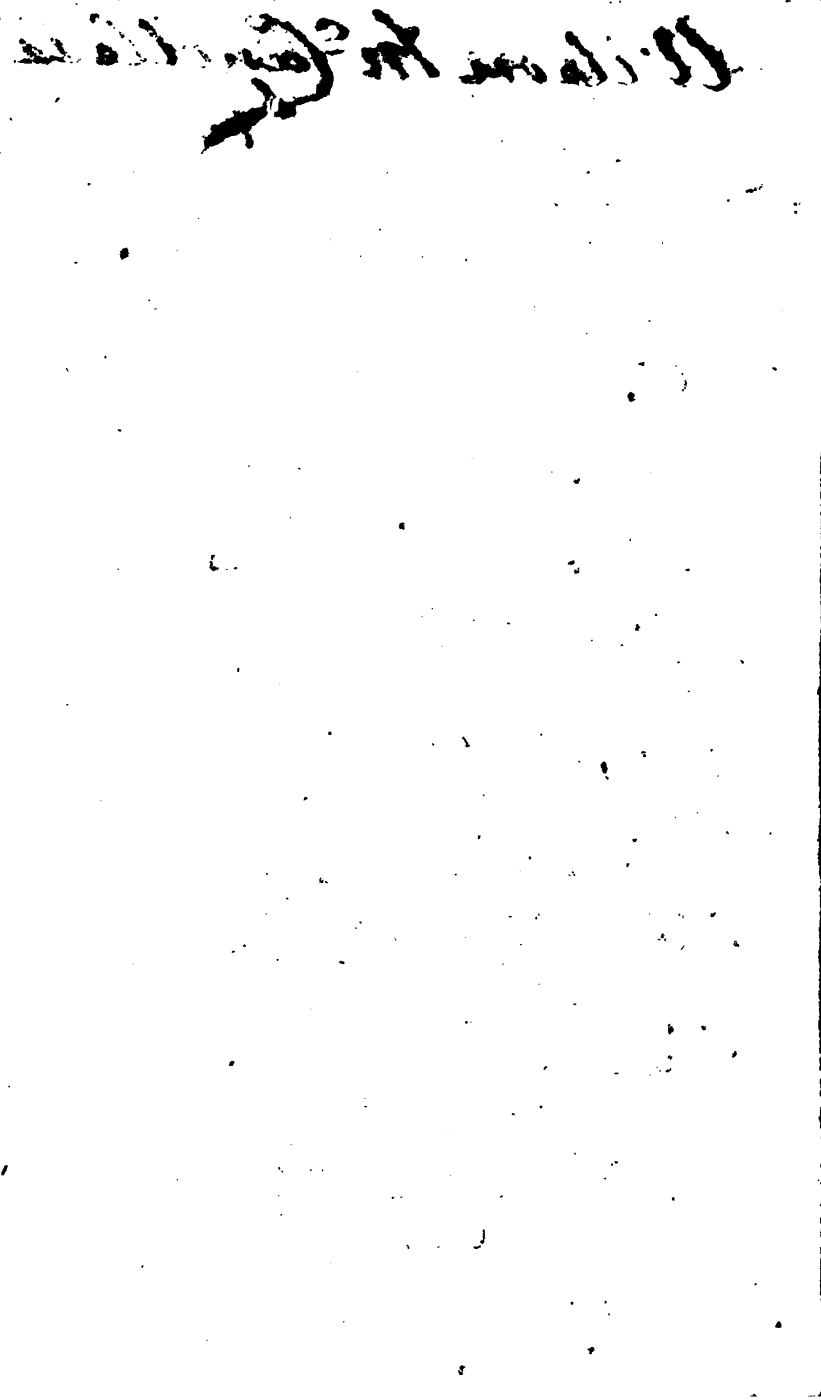
By WILLIAM DAVID EVANS, Esq.
BARRISTER AT LAW.

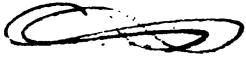
LIVERPOOL: MERRITT & WRIGHT. 1802

NEW BERN;

MARTIN & OGDEN

1802.



James Montagu
Anno Dom. 1746
TO 

SIR EDWARD LAW, Knt.

HIS MAJESTY'S

ATTORNEY GENERAL,

The following ESSAYS.

Are most respectfully inscribed.



I H A D often contemplated as a favourite project, the composition of such a series of essays as might afford a view of the principles of jurisprudence, connected with mercantile transactions; adequate to the purposes of general enquiry, and divested of the minuteness and detail necessary for professional purposes. The knowledge of rights and obligations, as founded on the eternal principles of justice, as modified by the habits and exigencies of particular communities, and more especially as incorporated in, and recognized by our own municipal institutions, appeared to furnish materials for an undertaking attended with gratification and improvement to myself; and if pursued with competent attention, not destitute of utility to the public. My intention was not so strictly limited to subjects of commerce as to exclude other topics, depending upon analogous reasoning, and important in their application to the general purposes of society; comprising, amongst others, the subject of one of the following essays. I had also flattered myself with the idea of completing this survey in a work of moderate extent, and under these impressions committed to writing as introductory to the general design, the obser-

uations which now accompany the execution of a subordinate part.

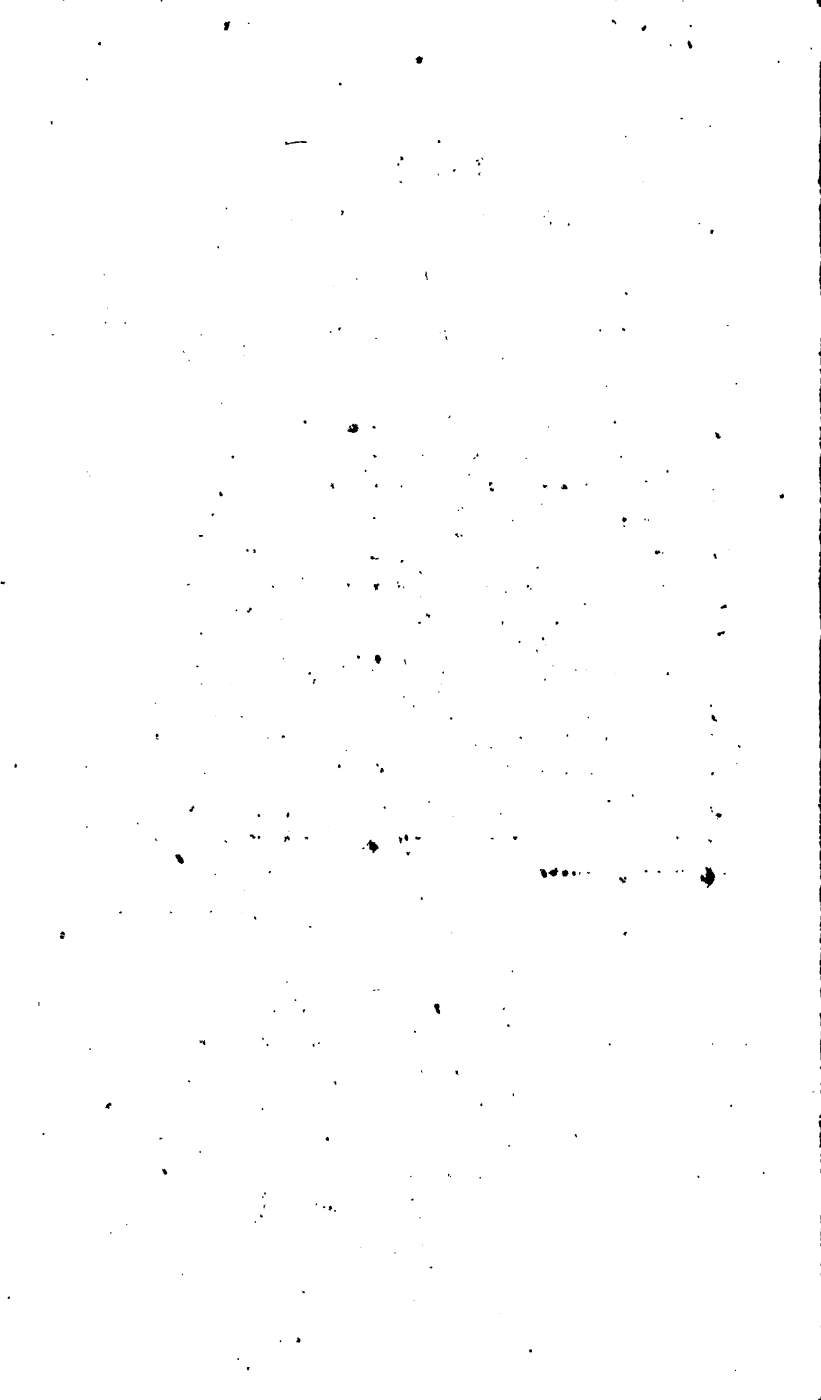
In the progress of my endeavours to execute the plan before me, I found that I had been too sanguine in my expectations, and was induced to relinquish the purpose of embracing a general system, and to limit my views to some of the particulars comprised in it. The general law of contracts was intended to be considered in a very summary manner, without following the several ramifications either of natural equity or positive institution, but having resorted to Pothier's Treatise on Obligations, as an auxiliary, it has, from repeated additions, become a principal; and I have attempted the adaptation of it to the English law, and hope, at no distant period to be warranted in submitting it to the public.

The Essays included in this volume were printed with an intention of separate publications, and are paged accordingly, but it was afterwards deemed expedient to issue them together; they will be speedily followed by an Essay on the Law of Partnership.

The consideration that some of these subjects, have already been discussed by gentlemen of talents perfectly adequate to the purpose, and that other gentlemen equally competent, have announced a similar intention, does not appear to furnish an objection of so much importance, as from the cla-

though sometimes raised against the multiplicity of law books, might probably be supposed. The nature and design of the essays in which I have been engaged, will, I hope, be found sufficiently distinct from those of other publications already existing, to avert the charge of an invasion of property, or of a want of proper courtesy; and as to the mere objection of multiplicity, the observations of different persons upon similar subjects, may receive a mutual confirmation from their accordance, or, by their diversity, may lead to further examinations, improving in their progress, and satisfactory in their result.

I have only to add, that I have, for the most part, declined referring to the particular rules and distinctions of judicial proceedings, a familiarity with which is essentially necessary in the professional exercise of the law, but which are not material in the delineation of it as a matter of general science.



PRELIMINARY ESSAY.

THE minute and intimate knowledge of the law, is in every country that has made a progress in civilization, interesting only to a particular profession, the members of which are resorted to for assistance, when the occasional exigencies of their fellow citizens require protection and redress. But as a general rule of conduct, every individual has an immediate and constant necessity for its application, and consequently has a continual use for the knowledge that defines his rights and obligations, as a member of the community to which he belongs, and it is requisite in a still greater degree to be familiar with the laws that immediately affect his particular rank and occupation. Important, however, as the acquisition of this knowledge is, it is seldom the object of particular study and application. Habit and experience may lead to a vague acquaintance; but a connected and methodical investigation can alone furnish that knowledge, founded upon principles, upon which any reliance can be confidently placed. It is frequently supposed by persons who have not considered the subject with attention, that law is the mere creature of positive and municipal insti-

tution, whereas, in its general operation, it is founded upon those moral principles of justice and integrity, which are immutably and universally the same. These, therefore, are to be regarded as the basis of every system of jurisprudence; but the particular habits and policy of every community, have superadded positive regulations which form the essence of local or municipal law, connected with and modifying, but by no means superseding the general system of moral justice. This connection should be constantly kept in view by all who direct their attention to legal enquiries, whether as a professional science, or as a rule of conduct.

The municipal laws are derived either from positive institution, from usages immemorially or gradually adopted, or from judicial decisions, which having settled particular differences, are, for the sake of certainty and uniformity, made the foundation of general rules. Upon comparison of a variety of decisions relative to analogous subjects, subordinate systems arise, which become familiar from practical application, and to these, as to known and settled principles, particular transactions are presumed to refer; a circumstance materially conducive to certainty and dispatch.

The laws of every country are intimately connected with the character and habits of its inhabitants, since from these result the various appeals to judicial authority. Accordingly, during the

prevalence of the feudal system, the main object of law was, to adjust and modify the various relations of military dependance. In the more improved state of Europe, the extension of commerce has necessarily induced the extension of commercial jurisprudence; and Great Britain in particular, furnishes an eminent example of this concurrent progress. In mercantile law, the principles of universal justice are peculiarly prevalent; and consequently the institutes and adjudications in different countries, being derived from a common source, have a considerable uniformity in their nature and application; so that the laws of England, of Rome, and of France, may receive and afford mutual illustration. The three great principles of the Roman law, as stated by Justinian, are *honestè vivere, suum cuique tribuere, alterum non ledere*, and to the preserving of these rules, and the vindicating of their infraction, every act of distributive justice may be ultimately referred. Mercantile law is principally connected with personal property, and the contracts or injuries to which that property is subject. Real estates being of a permanent nature, are usually subject, in a greater degree, to local and peculiar regulations, dependant upon accidental policy.

As a general proposition, and anterior to those regulations or restrictions which positive law or custom has introduced, or which result from the regard to general propriety, every person may engage in any occupation and dispose of proper-

ty, in any mode, and make every kind of contract, or do any other act not injurious to the rights and interests of another; and all contracts entered into without fraud or force, are legally and morally obligatory according to their spirit and intent: but this proposition in every state of civilized society, is subject to several limitations, the nature and application of which are principal subjects of judicial authority.

Here it may be proper to observe, that systems of law being conversant with human actions, will naturally partake of human infirmity, and that in forming such regulations as are most beneficial, upon the whole, partial inconveniences and occasional mischiefs, must almost necessarily occur; for the introducing dispensations to general rules, which are the great guides and land marks of civil conduct, for the purpose of meeting the exigency of individual cases, would lessen the authority, and certainly and consequently destroy the benefit of the rules themselves. It should also be remarked, that the influence of moral obligation arises from the consciousness of the party who is to exercise it; but judicial authority must act either upon the admission of those who are the objects of it, or through the medium of evidence, which in its most perfect state, only reaches to probability, and in order to make that probability most frequently accord with real truth, systems of evidence are adopted, which, in the administration of justice, are of obligatory authority. A legislator, in issuing his mandate, and a judge in

deciding between individual parties, must have reference to the right of third persons, and the general rules of public policy. But an individual is his own judge with regard to the evidence of facts; the want of legal solemnities is no moral exemption from the performance of his engagements, nor can he be morally justified in their violation, by resorting to the general rules of civil policy, intended to guard against the abuses which may result from the mere exercise of natural liberty. So that in those cases, where a man is an arbiter to himself, the obligation is necessarily more extensive than that which results from the exercise of legal authority, the excellence of which consists in enforcing the obligations of private morality, as nearly as a regard to the general interests of society, and a due attention to the most accurate rules of evidence, will admit. But there are many cases in which private morality is necessarily neuter, as the succession to vacant property, and various other instances that will readily present themselves to the mind. These depend almost wholly upon the regulations of municipal law, which, with regard to them, is the more estimable, as the more definite and precise.

In referring to the limitations of the natural rights of individuals, which however I do not affect particularly to enumerate, it may be proper, in the first place, to advert to the nature of civil government, which is necessarily anterior to the ex-

istence of civil law. Every state must have a supreme authority, the preservation of which is a primary object of regard. Every government has its peculiar public policy, to which the private acts of individuals must be subordinate, and with reference to which, many laws and regulations are introduced. For instance, a great object of British policy, is its superiority in navigation; to preserve that, many peculiar provisions have been made, prohibiting some contracts, and regulating others with a strictness which is deemed necessary to prevent the system from becoming illusory. Contracts by a subject, to favour countries in a state of hostility, are in every nation, and that upon natural principles, not only invalid, but highly penal. No public authority can be maintained without an adequate revenue, and therefore the general and natural right of property is subject to the demands established by law, for the production of that revenue. Here, we have a fertile source of legal regulation: all acknowledge the general necessity, but each person wishes to except his own property as far as he is able, and from the pressure which he feels, is induced to think he has burthens thrown upon himself disproportionately. To prevent the subterfuges and evasions, which would result from this source, and others more directly fraudulent, various regulations become necessary, which restrain the natural right of importing, exporting, inland carriage, and manufacture, according to the unlimited exercise of private inclina-

tion: regulations, introduced to ascertain with accuracy, the proper contributions to which each portion of property is subject, but frequently extended to the injudicious depression of commerce and manufactures, by cramping the proper and beneficial course of business, by instituting inconvenient *formula*, and subjecting casual inattention, to the consequences of knavery and fraud.

The regulation of coins, of weights and measures, is not to be regarded so much as a municipal restriction, as it is to be classed among the benefits of government and civilization, by furnishing general instruments to facilitate that intercourse which would otherwise be cumbersome and uncertain.

There are other restrictions resulting from internal policy, which are either such as affect the community at large, or such as are incident to particular places, as the peculiar privileges of corporations, wherein the power of engaging in various trades, is confined to freemen, or other persons of a particular character and description.

The establishment of fairs and markets, likewise amounts to a local restriction of a nature more beneficial, as it only regulates the mode and place of traffic, without inducing any personal disability.

Our municipal laws have also confined the right of exercising many arts to those who have serv-

ed apprenticeships, a regulation which was deemed necessary to ensure to the public, a supply of persons possessed of competent skill, but which, in its effect, has mererly operated in checking industry and ingenuity, or aiding personal animosity. Wherever the right of exercising a particular art or occupation, either generally, or in some division of it, or in respect of locality, is a property vested by laws, either in the state or in individuals, it is necessarily so far an exclusion of the interference of others: as for instance, the carriage of letters is confined to the executive government; the rights acquired by patent or under general laws, giving a limited property to publishers of literary or graphic works, or to inventors of new patterns, operate in restriction of the natural rights of individuals, and furnish a ground of civil injury in their infraction, as upon the same principles does the erection of a contiguous ferry, when one already exists, invested with the character of property, and not the mere result of accidental speculation;

The subjecting the sale of intoxicating liquors, and the exhibition of public entertainments to magisterial authority, are rather referable to orderly police, than to mercantile jurisprudence. The regulations which affect the learned professions, also depend upon principles unconnected with the leading object of our attention. Besides these, there are regulations, proceeding upon the general principle that no man shall use his own liberty, so as to prejudice the comforts and interest of ano-

ther. These partly depend upon the natural rule *alterum non lædere*, which renders a nuisance to an individual, or the community at large, subject to a private action or criminal prosecution, and partly upon positive institutions, which more particularly regulate and enforce the same principle, as by prescribing the particular places and manner in which occupations, necessary in themselves, but attended with danger, or inconvenience, shall be exercised. There are further positive regulations, in order to prevent those who are engaged in different occupations from injuring the public by tacit combinations, or individuals by concealed defects, or by taking improper advantages: such are the laws which regulate the sale of corn and coats, the manufacture of leather, or the business of a pawn-broker.

Property, as the object of law, may be considered as comprising, besides lands, not only the money and goods, which are the object of sight and manual transfer, but also those rights with which the public has vested any individual or corporation, as the tolls of fairs or markets, the duties payable in corporate towns, the exclusive, and especially the transferrable exercise of any occupation, and also the definite and legal obligations, which are due by contract from one individual to another; all these being ultimately convertible into money, the common instrument and measure of property.

Contracts are principally relative to property

or to personal labour and skill, which leads to the same effects, and regard either the interchange of one commodity, (including in that term acts of labour or skill) for another; whether permanently or partially, or to mutual hazard or advantage upon accidental speculations. With regard to these, the law in general lends its sanction and authority to the acts of individuals; but the natural right of entering into, and the consequent legal obligation resulting from contracts like the natural right of action in general, is in a state of civilization, subject to several exceptions and regulations. Those in which the parties contract to the prejudice of the community, or of other individuals, especially in the secret violation of their own relative duties, or those in which the object is founded upon turpitude, as of prostitution, are upon the great principles of justice and morality wholly discountenanced. Other contracts are regulated by positive law, for the sake of certainty, as those which require the obligations of the parties to be reduced into writing, to be evidenced by certain tokens, or defined by certain expressions. In general, parties express the object of the contracts particularly and minutely; but some contracts are of such frequent occurrence, as to have by tacit consent, a particular operation, in which the intent is implied from a reference to the usual mode and nature of the contract, and the incidents which have been attached to it either by positive law, by common accepta-

tion, or by judicial authority. Such are bills of exchange, and policies of insurance.

Wherever there is a right recognized by civil authority, the same authority supplies a remedy for the infraction of that right, without which its recognition would be useless and nugatory. The particular proceedings, which are necessary for this purpose, are chiefly matter of positive regulation, and differ in different countries, but as a general rule the laws that give the remedy are from their nature, connected with, and dependant upon the rights themselves; and whenever the misconduct of individuals is in its consequences detrimental to the public, then not only redress, but punishment, is the object of the law.

In tracing the operation of the law upon particular subjects, it should be observed, that though positive laws are principally dependant upon their own particular provisions, in the laws which are the result of natural reason and justice, and even in the rules for the construction of positive law (those rules being themselves founded upon natural reason) there is a general analogy, by which one subject will receive illustrations and assistance from the investigation of another.



.....

AN
ESSAY
ON THE
ACTION FOR MONEY
HAD AND RECEIVED,

INTRODUCTION.

IF one person receives a sum of money for the purpose of paying it over to another, his obligation to make such payment is too plain to require any comment. The general obligation to refund money, which has been paid under a mistake, or obtained by fraud or extortion, or given for a purpose to which it has not been applied, is equally evident. According to the Roman law, actions of different denominations were adapted to the several cases, in which such payment was unduly made. The English law has adopted a general supposition, that the money which ought to be refunded was received for the use of the party by

whom it was paid, and that the person receiving it made a promise to pay it on request. And the action used for this purpose is called AN ACTION FOR MONEY HAD. AND RECEIVED. This action has also an extensive latitude as a mode of trying adverse rights; for if a person sells my property under a claim of title or otherwise, I may in point of form consider him as my agent and charge him with having received the money for my use and made a promise to pay. I have no intention at present of examining the different cases in which this is the proper form of action, where it is agreed that a right of action in some shape certainly exists. I shall only observe, that the extension of it has of late years been considerably favoured, and a party may now obtain redress upon this general allegation, in many cases where it was formerly deemed necessary to make a particular and circumstantial statement of his demand, whereby the danger of failing from an error in the statement was considerably increased: and in the cases where a person has his election to bring his action, as for a wrong, or, waving the injury, to consider the conversion of his property as an agency, and an obligation to account, he must act consistently throughout, and not treat the same act as licit for one purpose, and tortious for another. If I charge a man with converting my corn or timber to his own use, and sue him for damages, it will be no justification, that I owe him a sum of money; but if I proceed

INTRODUCTION.

3

against him in an action for money had and received, in order to recover the produce, he may set off his debt, and I cannot oppose the argument that his being my creditor does not warrant his taking and disposing of my property. Where death or bankruptcy has taken place, the choice between these two remedies is often very important.

The present essay will be chiefly confined to the action for money had and received, as enforcing an obligation to refund money which ought not to be retained. The Roman system of jurisprudence ranked this as a *Quasi* contract, being an intermediate order between contracts properly so called, which were founded upon actual consent, and wilful wrongs. And without particularising their technical distinctions, I shall, in referring to that law, in general consider the term *Solutio indebiti*, as comprising the general distinctions arising from a liability to refund.

This obligation was enforced according to the general principles of natural equity, the foundation of it being a retention by one man of the property which he had unduly received from another, or received for a purpose, the failure of which rendered it improper that he should retain it. The mere legal liability to the original payment was not the question in consideration, but the injustice of permitting the money or other property, under all the circumstances, to be retained. The intro-

INTRODUCTION

duction of the action for money had and received into the English courts, is not novel, and several cases had occurred previous to the appointment of Lord Mansfield, in which it had been properly applied, so that it was familiar in point of practice. But it was reserved to that eminent judge to trace the nature and principles of the action, with a most instructive perspicuity, and to direct the general application of it in its proper channel.

In some instances the particular decisions may be reasonably questioned, but the utility resulting from his general discussions must be universally allowed. In the case of *Moses v. Macferlan*, 2 Burr. 1005, which gave him the first opportunity of expressing his opinion, upon this ground of action, he very compendiously stated the nature and principles of it, coinciding in effect with the institutes of the civil law. The following extract from his opinion, will furnish a proper introduction to a more minute examination of the subject.—
 “This kind of equitable action to recover money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money, which *ex æquo et bono*, the defendant ought to refund, it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal

INTRODUCTION.

5

and legal interest upon an usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got by imposition, (express or implied) or extortion or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under these circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money."

The maxim of the civil law, that it is naturally just that one man shall not be enriched to the detriment of another, *Hoc natura æquum est, neminem cum alterius detrimento fieri locupletiores*, is particularly applied to the claim which we are at present examining.

The Commentary of Vinnius upon the title in the institutes, *De solutione indebiti*, contains a very instructive view of the subject. His general exposition of it, which agrees in substance with the preceding observations of Lord Mansfield, is as follows: "In order to induce an obligation in favour of the person paying, and a right to reclaim what has been paid, two things are required. That what is paid should not be due; that it should be paid

Ec.

D

through error. In respect of the first; there is no repetition of what is really due: and nobody can suppose that there is a right of repetition if what was paid was due both in point of law and of natural justice. But supposing it only due according to one of these: if it is only by strictness of law, without any obligation in point of equity, and could be repelled by a perpetual exception, the right of repetition is allowed; as such a sum cannot be said to be due except in name. But what is due according to natural justice is considered as being really due; and although the payment of it could not be enforced, yet if it is actually paid though by a person who supposes himself to be liable in point of law, it cannot be reclaimed. If a debtor has a perpetual exception, but which is founded upon some reason that does not remove his natural obligation, and not being apprized of it, pays the debt, he has no claim to repetition. Such is the exception of a judgment in his favour, as the sentence of the judge cannot destroy the obligation founded on the consent of the party, and therefore it was decided, that a person really indebted, but liberated by a judgment in his favour, could not insist upon a repetition. Also, if a person under the power of his father, borrowed money, from the payment of which he was protected by the *Senatus consultum Macedonianum*, and after he became his own master (*pater familias*) paid the money, he was bound, as there was a natural obligation subsisting.

CHAP. I.

Of Money paid by mistake.

WITH respect to money paid under a mistake, Vinnius observes, that "error is twofold, of fact, that is, when there is an ignorance of the fact, out of which the law arises, or of law, when the fact is known, but there is an ignorance of the legal consequence."

SECTION II. *Mistakes of Law.*

"Hence it becomes a question how the maxim is to be understood, which is laid down simply and generally, that whatever has been paid by mistake may be reclaimed, whether it applies to error of fact only, or extends to error in point of law? The opinion of the old interpreters is, that if no natural obligation intervenes, even what is paid under a mistake in law, may be recovered back, in which opinion I concur. I am principally influenced by this reason, that the right to recover back what has been unduly paid, is founded upon equity and moral rectitude, of which it is an universal consequence, that it can only be repelled by an exception founded upon the same principles. But what pretence of equity can a person have, or what colour has he for excepting to the injus-

tice of being required to refund what has been paid to him, though under an ignorance of the law, but was nowise due to him upon the principles of natural justice; as if a person was induced by fraud or force to enter into an engagement. I cannot be brought to think that what has been paid in the execution of such engagement can be retained, and that any man can avail himself of his own iniquity, under the single pretence that the person who made the payment mistook the law, and was ignorant that an engagement so obtained, was of no legal efficacy: and lest this should seem to be an assertion without authority, the text of the law is evidently applicable, wherein Julianus following Nerva and Atilinius, elegantly answers, that money paid by one who thought it was due from him, but might have protected himself by an exception of fraud, might be recovered back. And this is paid under an error of law. And there are other similar instances. I am also influenced in this opinion by the consideration that in the whole title of the pandects *de condictione indebiti*, though it is diffuse, the right of reclaiming is never limited to payments made under an error in fact, or excluded from those which are made under an error in law, but is constantly referred to payment through error generally, whether the payment was nowise due, or whether it was barred by reason of a perpetual exception*.

* Payment is considered to be unduly made, not only if it is nowise due, but if it could not be recovered in consequence

from which it may be understood that the nature of the error is no bar to the recovery, but the knowledge of the person who pays, and that alone is an impediment. And this is also proved by the reason which is given for precluding a person from recovering what he has paid, knowing it not to be due; that he is considered as having made a donation, which cannot be affirmed of a person who conceives himself to be under an obligation, and necessarily bound to pay. Lastly, I am influenced, and that in a principal degree by what is stated in the 8th law of the title, *De juris et facti ignorantia*, that an error of law shall not prejudice any person, so far as to induce the damage of losing his property, which seems clearly to denote that what is paid under a mistake in point of law, may be reclaimed; because, if that be denied, it must be admitted, that an error in point of law, does extend to prejudice a person by inducing the loss of his property, contrary to the opinion of Papinian, in the law which has been cited. For the answer of those who dissent from this argument is a mere cavil; they insist that the person claiming a right to be repaid, does not contend in respect to the losing of property, but in respect to property which

of any perpetual exception. Wherefore such also may be reclaimed unless it is made with the knowledge that the party is protected by the exception *De condic. indeb.* 26. S. 3. Whoever has a perpetual exception, may reclaim what he has paid by mistake, l. 40. If a payment is made through error upon any of those considerations, which have no legal effect, it may be reclaimed. l. 54.

is already lost; (*non de re amittenda sed de amissa*) for a person who pays his money under a mistake of the law, so far loses it, that he has no remedy for recovering it back, then an error of law does induce the damage of losing his property. Neither does the question refer to the time of instituting a suit for the recovery; but that in which the payment is made. And Papinian denies that a person, in consequence of an error in law, can lose his property, that is, by being precluded from recovering it. And what the same Papinian lays down in the preceding law, that ignorance of the law is of no avail to those who wish to acquire, but does not prejudice those who only seek their own, (*juris ignorantia non prodest adquirere volentibus suum vero petentibus non nocet*) is to be understood as an universal proposition. Neither is the 29 law D. Mandati*, any obstacle to this course of reasoning; for there a case is proposed of two persons, contesting which shall avoid a loss that has been incurred: the debtor who could have availed himself of a perpetual exception, and the surety, who not being ignorant of the fact, paid the money: and it is decided, that the surety has no right of action. But there is not a word in that law about the obligation to refund: and where it is said in the ninth law, *de juris et facti ignorantia*,

* Non male tractabitur, si cum ignoraret fidejussor inutiliter se obligatum solverit an mandati actionem habeat? Et si quidem factum ignoravit recipi ignorantia ejus potest, si verum, aliud dici debet.

that an ignorance of the law shall be prejudicial ; it is to be understood that it shall give no advantage ; that it shall not entitle a man to any gain, neither shall it subject him to any loss†. But still it is to be remembered that the payment made under an ignorance of law, can only be reclaimed if it was unaccompanied by any natural obligation. But if the person making the payment was naturally under such an obligation as may afford the party receiving a just cause for retaining it, a distinction is to be made between an ignorance of law and of fact ; and a right to recover shall be denied in the first case, but allowed in the last. If I pay a legacy according to the will of a testator, though it has not the requisite formalities : if I am not apprized of the fact of its wanting those solemnities, I may reclaim it ; but not if, knowing the facts, I was ignorant of the legal consequences. But this is not founded upon the single reason that a man shall be bound by his ignorance of the law, but because there is a natural obligation founded upon the will of the testator. And to this principle may be referred the passages in the code, wherein a right to recover is denied upon a mistake in law, or confined to a mistake in fact* : for in truth, you

† The passage in the digest relates to heirs, paying a legacy without availing themselves of the Falcidian law, by which a testator was restrained from giving away above a certain portion of his property in legacies.

* C. l. 6. de jur. et fact. ignor. Si non transactionis causa, sed indebitam errore facti, olei materiam vos Archantion stipulanti spondidisse Rector provincie animadvertit ; reddito

cannot merely in consequence of my having made a mistake respecting a matter of law, have any just cause of retaining what nowise belonged to you. And here we should attend to the rule, that it is better to favour a person reclaiming his own, than the adventitious gain of another*.

Pothier adopts the opposite conclusion, and states without reserve, that a person cannot be allowed to alledge an ignorance of law, which is not to be presumed, and is inexcusable, because he ought to take advice, and inform himself of the law respecting the business in which he is concerned. He refers to the law *10 de jur. et fact. ignor.* above cited, as deciding the question, and to the case in which the heir was not allowed to reclaim the Falcidian portion that he had omitted to deduct in payment of a legacy, as illustrating the difference between an error of law and an error of fact.

It is singular that a question, open to so much discussion, has passed with very little attention in the cases affected by it in the English courts. The

quod debetis, residui liberationem condicentes audiet, id. l. 10. Cum quis jus ignorans indebitam pecuniam solverit cessat repetitio; per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est. De condic. indeb. l. 6. Si per ignorantiam facti non debitam quantitatem pro alio solvisti, et hoc adito rectore provinciae fuerit probatum hanc ei cujus nomine soluta est restitui eo agente providebit.

* Melius est favere repetitioni quam adventitio lucro.

opinion of Vinnius appears to be best founded; as it arises from the application of the rules of natural justice, upon which this right of action rather depends, than upon any positive rules or artificial reasoning. I conceive it may now be positively stated, that this opinion is adopted in the English law. In the case of *Archer v. the Bank of England*, Doug. 638, the payee of a bill had restrained its negotiability by an endorsement, that the drawees must place it to a particular account. Afterwards it was negotiated with a forged endorsement of the name of the person to whose credit it was to be placed; and the drawer, for whose honour it had been paid to the bank, was allowed to recover the amount. This case was fully open to the question under discussion. The person who paid the bill, and who must be considered as the drawer (the act having been adopted by him) could not be deemed ignorant of the fact, for he had only to read the endorsement; but the argument, though there was a difference of opinion, did not embrace this general question; and turned wholly upon the effect of the endorsement. The principle was more evidently adopted in the case of *Blize v. Dixon*, 1 T. R. 285. An insurance broker was indebted to a bankrupt in a considerable sum of money, but had counter-demands for losses, due to persons, on whose behalf he had effected insurances on commissions *del credere*. These he had a right to set off, but under the mistaken idea that he had no such right, he paid the whole debt from himself to

Ev.

E.

the assignees; he afterwards gave them notice of the mistake, cautioning them not to make a dividend. Lord Mansfield said, "that the general rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action." Still there was no *express* reference made to a mistake in point of law. But in a late case before Lord Kenyon, the point was more explicitly mentioned. The drawer of a bill of exchange paid the amount to the holder, knowing that he had given time to the acceptor, who had become a bankrupt. His lordship said, it is not only necessary that the plaintiff should know all the facts, but he should know the legal consequences of them. It seems to me that the plaintiff did not know the legal consequences of them, and he paid the money under an idea that he might be compelled to pay it. Where a man, knowing all the facts explicitly, and being under no misapprehension with regard to any of them, nor of the law acting upon them, chooses to pay a sum of money, *volenti non fit injuria*, he shall not recover it back again,—Chitty on Bills, 102. The case came before the court of King's Bench, who confirmed Lord Kenyon's opinion, but it is not reported. Lord Chief Justice De

Grey said; in the case of *Farmer v. Arrundel*; 2 Bl. Rep. 125, that when money is paid by one man to another on a mistake, either of fact or law, the action would lie; but this was an *obiter dictum*, the decision of the particular cause being in favour of the defendant.

I shall have occasion in a subsequent part of this essay, to allude to some other cases in which an ignorance of the law became in some degree, the object of consideration; but they turned upon a different principle from that which has been hitherto the topic of enquiry.

SECTION II. *Of Mistakes in Fact.*

It will be unnecessary to attempt a particular enumeration of the several cases, in which there may be a right of reclaiming money paid under a mistake of fact: whether upon a supposition that something has occurred to induce a liability of payment, which in point of fact, has not occurred; as if an insured has paid for the loss of a vessel not heard of for an unusual length of time but afterwards found to be safe; or from an ignorance of some fact which has, actually, taken place; as if the endorser of a bill paid the amount to the holder, not having the notice to which he was entitled, of its having been refused acceptance. It is in general immaterial whether the person receiving was under equal ignorance or not, provided he had no right to the payment which has been erroneously made: the obligation to refund is, in either case,

equally strong. But a mere error in the motive for transferring a sum of money, does not necessarily induce a right to reclaim it, if there is no error with respect to the nature of the act, and this is the rule in regard to contracts in general. Therefore if I gratuitously give a person a sum of money under the notion that he has rendered me some valuable service, and afterwards discover that the notion was ill founded : this affords me no right to reclaim it, because I intended a donation, though that intention was induced by an erroneous supposition.

The principle that what a man pays with full knowledge, and without any undue influence, cannot be recovered back, being established ; Pothier puts the case of its being uncertain, whether a man paid what was not due from him knowingly or erroneously, and decides that it ought to be presumed that the payment was made erroneously, and that he should be allowed to reclaim it according to the general principle ; that where the circumstances are obscure, the right of repetition is to be rather favoured than an adventitious gain. *In re obscura melius est favere repetitioni quam adventitio lucro.*

CHAP. II.

Of Money paid on a consideration, which has failed.

MONEY paid under a condition which happens to fail, is, in the civil law, the subject of a distinct title, *De conditione causa data causa non secuta*. This may happen through the misconduct of the defendant, through a change of inclination in the plaintiff, or from accidental circumstances.

SECTION I. *Of failure by Misconduct of the Defendant.*

In the first class may be placed the case of Dutch *v. Warren*, which is particularly adverted to by Lord Mansfield, in *Moses v. Macferlan*. The defendant agreed to sell the plaintiff five shares in some copper mines, and received the purchase money, but afterwards refused to transfer the shares, telling him that he might take his remedy: and upon an objection that there should have been a special action for the non-performance of the contract; the court said, that "the extending these actions depends upon the notion of fraud. If one man takes another's money for doing a thing, and afterwards refuses to do it, it is a fraud, and it is at the election of the party injured, either to affirm the agreement by bringing an action for

FAILURE BY MISCONDUCT.

the non-performance of it, or to disaffirm the agreement *ab initio* by reason of the fraud, and bring an action for money had and received to his use. It is customary in a declaration, to combine these charges: but the distinction is not merely technical, for there may be an important difference in the amount of damages: and in case of a bankruptcy, a debt may be proved under the commission for money paid without consideration; but there can be no redress for accidental damages. If a person sells an estate by auction, giving a description which is not found to coincide with the premises put to sale, the purchaser may bring this action for a return of his deposit. This occurred a few years ago, in an action against Mr. Chinste, who described a country mansion in his particulars as possessing every beauty and accommodation, but which the buyer, upon going to view his purchase, found to be totally destitute of all the recommendations ascribed to it. In a late case, the defendant agreed to sell the plaintiffs cordwood, and proceeded so far with part of the wood, that, according to the general custom in such cases it had become the property of the purchaser. The plaintiffs paid a sum of money on account, but upon the defendant neglecting to cord the remainder of the wood; brought an action to recover back the money, as having been paid upon a consideration that had failed; and it was held, that the action was maintainable. Lord Kenyon said it was an entire contract; and as by the defendant's default,

The plaintiff's could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and recover back the money that they paid under it. They were not bound to take a part of the wood only.—7T. R. 183,

SECTION II. *Of failure by change of intention in the plaintiff.*

The failure of consideration by a change of intention on the part of the plaintiff, may induce the right of repetition, provided he was under no obligation to the defendant in respect to its completion. A common instance of this, is the return of the premium upon a policy of insurance, the risk never having commenced. If I employ an attorney to institute a cause, or a broker to purchase a parcel of goods, and change my intention at the outset of the cause, or before the purchase is made, they must return the money which was advanced, subject to a proper deduction for the trouble and expence already incurred. Ulpian puts the case of a person employing another to take a journey, and decides, that if the employer is, under the circumstances, at liberty to change his intention, he may reclaim what he has advanced for the expences; but if the person employed has been at expence in preparing for his journey, he is only bound to refund the balance.

Where a person bought a chaise, with liberty to return it, paying 3s. 6d. per day for the hire, and returned it accordingly. It was held, that he

might bring this action to recover the purchase money, the consideration having wholly failed by his availing himself of the condition. *Towers v. Barrett*, 1 T. R. 133.

SECTION III. *Of a Failure from accidental circumstances.*

A failure from accidental circumstances may happen several ways. If a person supposing himself to be upon the point of death, makes a donation *causa mortis*, and afterwards recovers, he may reclaim what he has given. If an insurance is made with warranty, and is void from the warranty not being complied with, the premium must be returned. If a sale has been put an end to by the mutual consent of both parties, the deposit money must be refunded. Where money is paid for the purchase of property, to which the seller cannot give a sufficient title, the case may fall under this division, or be imputable to the fault of the defendant, according to the circumstance of his being acquainted with, or ignorant of the defect. In case of the purchase of land, I think it may now be considered as an established point of law, that after a conveyance is made, the purchaser, in case of eviction, has no claim to a repetition, for want of title in the seller, (unless the seller was guilty of fraud, by knowingly concealing the defect.) Mr. Fonblanque, who seems to consider the subject as in some degree open to argument*, contends in

* 1 B. C. 5. S. 8.

favour of what I have above supposed to be the rule of law; observing that the opposite decision would lead to the most serious inconvenience, as every contract, however guarded and bounded in its terms, would be liable to be opened at any distance of time. The particular inference which he draws from an expression in *Bree v. Holbeach*, Doug. 657, "that the assignor of a mortgage did not covenant for the goodness of the title, but only that he had not incumbered the estate, it being incumbent on the plaintiff to look to the goodness of it," is not fully supported; because the question in that case turned upon the statute of limitations, and the suggestion of fraud. It is not said that if the action had been commenced within six years, it would not have lain in consequence of the nature of the demand. The opinion of the profession, however, seems to regard the point as settled; though it has not been the direct ground of any determination. I have always entertained considerable doubt of the utility which results from adopting this maxim. As to the inconvenience that the contract might be opened at any distance of time, the right of recovery is by the determination in the case of *Bree and Holbeach*, restricted to the period allowed by the statute of limitations; and viewing the subject in any other respect, the purchaser, who acquires no effective title, parts with a large sum of money to the seller, who by reason of his want of title, in effect parts with nothing, yet is allowed to retain that sum. Thus he derives

Ev.

F

a clear gain, and the purchaser sustains a clear loss of the whole amount. *Unus ex alterius detrimento locupletior fit.* In a late case, a person sold a leasehold interest in some premises, from which the purchaser was evicted for want of title: but no regular conveyance having been made, he was allowed to recover the purchase money, and the ground of the decision was, that the whole passed by parol, *Cups v. Read*, 6 T. R. 606. This case shews, that the rule is founded upon the principle, that no engagement shall be implied which is not expressed where there is a formal contract; and the rule is reasonable as far as regards the warranty of the title; and the right to consequential damages. But the money was paid upon a consideration which has failed, and therefore it is only on the ground of technical authority, contrary to general principles, that it can be retained. *Caveat emptor*, when applied to a retention of the purchase money, may be translated "The devil take the hindmost."

In a case which arose early in the 18th century, the court of Chancery, decreed one hundred guineas as part of an apprentice fee, to be paid back to the father of the apprentice, his master having died within three weeks after the sealing of the articles, though it was expressly provided by the articles, that if the master should die within the year, only sixty pounds should be returned.—1 Vern, 460. Lord Kenyon, when Master of the Rolls, observed, that this decision carried the authority of the court as far as could be.—3 Bro. Ch. 480. And Mr.

Ponblanque observes; that if it be a rule of equity, as in many cases it is stated to be, that equity, will not alter or extend the agreement of the parties, the decree seems irreconcilable with such rule.—B. 1. C. 5, S. 8. A suit in equity must, in respect to this subject, be considered as being merely equivalent to an action for money had and received, and there can be no pretence for referring the decree to any other principle than that of money paid upon a consideration which has happened to fail; and the court, in decreeing the apprentice fee to be refunded, seems to have thought the consideration for which it was given, was the entire performance of the articles, whereas it was the fact of contracting the relation, and the entering into the consequent engagements. In that view the consideration was complete and entire, and could not partially fail. I much doubt whether the precedent would now be followed, but think it certainly would not be allowed by analogy to govern any other case.



CHAP. III.

Of Money paid through imposition or extortion.

AS to money got through imposition, it will not be material to enter into much discussion. The general principle is sufficiently intelligible, and there can be little difficulty in the application of it to particular instances as they arise. The tak-

ing a premium for the insurance of a vessel, knowing of her safe arrival; the representation by a person employed to buy a horse that he had paid 50l. when in fact he paid only 40l. and thereby fraudulently obtaining ten, are cases falling within this division of the subject. These cases also generally involve the circumstance, which has been already considered, as furnishing a principal ground of repetition, that the money is paid under a mistake. It may be proper to add, that persons knowingly and designedly obtaining money or goods by false pretences, and with an intent to cheat, are, upon a criminal prosecution, subject to very serious punishment.

Cases of extortion and oppression, are the taking of exorbitant fees, by officers of the customs; the detention of property pledged until more is paid than the principal and legal interest.—*Astley v. Reynolds*, 2 Str. 915. The detention of a surrender by the steward of a manor, until an improper demand was satisfied: the extortion of a sum of money for restoring property seized by mistake.—*Irwing v. Wilson*, 4 T. R. 485. In some of these cases it was contended, that the payment was voluntary. But it was truly answered that the rule *volenti non fit injuria*, only holds where the party has the freedom of exercising his will, which he has not when his legal rights are withheld from him. Every thing exacted as a condition for refraining from an unlawful act or injurious act, falls within the same general observation.

CHAP. IV.

Of Money paid on illegal Contracts.

THE illegality of contracts, upon which any sum of money has been paid, is a subject that requires a distinct consideration; and there are two divisions to which it will be convenient to refer; the first comprising contracts infected with criminality, turpitude, or oppression; the other, such as are merely void, so as not to induce any right of action, but not attended with those exceptions.

SECTION I. *Of Contracts attended with criminality, turpitude, or oppression.*

Upon the first division I shall insert the following extract from Domat, which clearly shews the grand distinctions of natural justice, as recognized by the civil law, and afterwards state their adoption and application in the law of England.

He observes, that by unlawful facts, we understand here, not only those which are prohibited by some express law, but all those which are contrary to equity, honesty, and good manners, although there be no written law, which makes mention of them: for whatever is contrary to equity, honesty, or good manners, is contrary to the principles both of divine and human laws. It may happen three

ways ; that by an unlawful fact, one may receive a sum of money, or other thing, from another person ; for the fact may be unlawful either only on the part of him who gives, or only on the part of him who receives, or on the part of both the giver and receiver. Thus he who, under pretext of civility, should make a present to one who he knew would be his judge or arbitrator ; and who, on his part, was altogether ignorant of the motives of the said present, would give unlawfully what the said person might receive without any offence to justice. When any person, by himself or others, exacts a sum of money, or other things, to hinder him from committing some great violence, or makes one deliver up to him the titles to some debt or some right which he owes, the said fact is unlawful only on the part of the person who commits the violence, and not on the part of him who suffers it. When a person receives money of another, either himself, or by a third hand, to commit some crime, some offence, or some injustice, the fact is unlawful both on the part of him who receives, and of him who gives.

If the fact be unlawful only on the part of him who gives, he who has received will not be obliged to give it back, unless it be that the circumstances regulate his duty in another manner. Thus, in the case of him who had received a present, being ignorant of the unjust motive of giving it, as has been explained : if the motive chanced afterwards to come to his knowledge, he would be obli-

Being either to abstain from the function of judge or arbitrator, or to give back the present which he had received, or even to do both the one and the other, according as prudence and equity might require, under the circumstances of the quality of the persons, and of that of the fact. When the fact is unlawful only on the part of him, who has received a thing from an unjust cause, he who has given it may recover it again, although the receiver may have performed what he was bound to do by his engagement; and nothing can excuse the receiver from making restitution, even although the thing were not demanded of him, nor from the other punishments which the fact may deserve, if it comes before a court of justice. If the fact be unlawful both on the part of him who gives, and of him who receives, the giver shall lose deservedly what he has employed to so ill a purpose, and shall have no action for recovering it*."

Where all the criminality is on the part of the person paying the money, it seems evident, that he can have no claim to the restitution of it, whatever may be the obligations of the receiver in respect of other persons, or however he may deem it improper to retain what has been so advanced,

The distinction between the illegality, which affects both parties, and that which only affects

* Ubi dantis et repetentis turpitudine versatur non posse repeti dicimus si pecunia detur ut male judicatur. ff. de cond. ob. turpem vel injustam causam. 3.

CONTRACTS

the receiver, is of the highest importance. In the first case, both parties transgressing a law made for the welfare of the public, or arising from the rules of public order, neither can have any pretence for calling in aid the assistance of a court of justice. If money is engaged to be paid upon such a contract, the courts will give no assistance in demanding it. If it is actually paid, they will give no assistance in reclaiming it. In the other case, the receiver only is regarded as an offender and cannot alledge his own offence as a bar to the demands of the party to whom his conduct is deemed injurious.

This was clearly stated in an action tried before Lord Mansfield, where a creditor had refused to sign a bankrupt's certificate without a sum of money being paid to him, in contravention of the statute which prohibits the payment of money for the signing a certificate, and the bankrupt's sister having paid the money, sued for the repetition of it; and Lord Mansfield said, it was argued, that as she founded her claim upon an illegal act, she should not have relief in a court of justice: but she did not apply to the defendant to sign the certificate upon an illegal or improper consideration; but as the defendant insisted upon it, she, in compassion to her brother, paid what was required. If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties

are equally criminal against such general laws, the rule of law is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's situation or condition, there the plaintiff shall recover; and it is astonishing that the reports do not distinguish between the violation of the one sort and the other. If a lender takes more than the principal and legal interest, an action will lie to recover the surplus. The case of money given to a solicitor, to bribe a custom-house officer, is against his own agent, and therefore the person giving it cannot recover. But the present is the case of a transgression of a law made to prevent oppression to the bankrupt, himself, or his family; and the plaintiff is in the case of a person oppressed, and from whom money has been extorted, and advantage taken of her concern for her brother. It is absurd to say, that any man transgresses a law, made for his own advantage, willingly. *Smith v. Bromley*, Doug. 697.

In subsequent cases his lordship has followed the same course of reasoning, observing upon the two sorts of prohibitions; that where the prohibition is founded upon general reasons of policy and public expedience, the parties offending are equally guilty, and there the defendant has the better condition. For instance, in bribery, if a man pays a sum of money, by way of a bribe, he can never re-
Ev. G

cover it in an action, because both plaintiff and defendant are equally criminal : but where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men ; the one from their situation and condition, being liable to be oppressed and imposed upon by the other ; there the parties are not in equal fault, and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action, and defeat the contract. The case of a person paying money to a lottery office keeper for illegal insurances, like those of paying money for signing a certificate, and usury falls within the latter of these descriptions, for the statutes upon that subject, are made to protect the ignorant and deluded multitude, who, in hopes of gaining prizes, not conversant in calculation, are drawn in by the office keepers. Vi. 2 Bl. 1373. Cowp. 197.—790.

In the case before Lord Northington, it appeared, that the defendant had, by means of Admiral Boscawen's mistress, procured the plaintiff to be appointed a lieutenant of marines, and received from him 200*l*. After the plaintiff was appointed, the other officers refused to roll with him, discovering that he had been a livery servant ; and having been in consequence discharged, he filed a bill to be repaid the money ; and Lord Northington decreed it to be returned with interest. He laid it down as a rule, that if a man sells his interest to procure a person an office of trust or service under

the government, it is a contract of turpitude; it is acting against the constitution; by which the government ought to be served by fit and able persons, recommended by the proper officers of the crown, for their abilities, and with purity. By this means, the most innocent and pure officer of the crown, whose business it is to recommend, may have his honour tainted and scandalized. It had been argued, that the defendant was to have had the appointment himself; and only sold his commission; but his lordship did not give credit to the fact. He said, that if the defendant might sell his interest, the plaintiff had been imposed upon, and that the defendant knew the plaintiff was incapable of it by having worn a livery. *Ambler, 432.* Of the turpitude of this contract, no doubt can be entertained; the imposition of it is not equally clear. The impropriety of appointing a livery servant an officer of marines was equally known to both parties, and although the degree of turpitude attached to a person selling his interest, may, so far as affects the public, be greater than that of the person buying it, the case of the latter seems sufficiently unfavourable to preclude him from any assistance in a court of justice.

There was a case in the King's Bench, where a sum of money had been paid in order to procure a place in the customs. The place was not procured, and the party who had paid the money having brought his action to recover it back, it was held

that he should recover, because the contract remained executory. And this was afterwards referred to by Mr. Justice Buller, as shewing a sound distinction between contracts executed and executory, and as supporting the position, that if an action is brought to rescind a contract, you must do it while it continues executory. *Vi. Doug.* 471. The decision itself is not reported, and it is not very easy to think it could be sustained upon any principle of general reasoning, for, divesting the case of the technical terms *executed and executory*; a sum of money was given for a purpose not merely void but criminal; each of the parties was affected by the objections founded upon public policy; every thing to be done on the one side was complete; but the other party not having fulfilled his engagement, the person who advanced the money would, in case it had been a lawful agreement, have been entitled to an action either for a return, or for incidental damages. But it being an illegal engagement, the law assisted one of the parties implicated in the illegality against the other. The corrupt price not having been productive, was decreed to be restored, though the performance of the agreement certainly could not have been enforced. All the meaning that the word *executory* can have in such case is, that the man, who had received money for the illegal purpose, had not carried such illegal purpose into execution; but between such parties acting in opposition to the law, it is not the

province of courts of law to interpose: - They rest their confidence in each other, and the law leaves the fulfilling or transgressing of it to themselves.

SECTION II. *Of Contracts which are void, but not criminal.*

The cases where contracts are void, but not attended with any circumstances which are illegal or immoral, are involved in some confusion, and will hardly admit of any settled principle, being confidently ascribed to them in respect to the obligation of returning money actually paid. It however seems to me that the true course should be to enquire what natural equity requires to be done, and whether under all the circumstances the money can be fairly and conscientiously retained.

Where the money is paid in contemplation of deriving some advantage upon a future event, and the event still continues uncertain, and every thing is entire, Mr. Justice Buller's distinction may be very fairly applied. I lay a wager upon the event of a prohibited horse race, paying Titius 5*l.* to receive 10*l.* Before the race is run, and whilst the event of it is uncertain, I may rescind the contract and require the five pounds to be repaid: but after I have lost it, and run the chance of his honourably fulfilling his engagement, if I had won, I have no pretence of justice to require the stake to be returned upon the allegation that he would not have been under any legal compulsion to pay: but if I have won the wager, and he should take ad-

VOID INSURANCE.

vantage of the legal exception, refusing to pay ~~me~~ the 10l. the question arises, whether he is compellable to return the five? And I think (viewing the subject at present, as not affected by any positive authorities) that he is. He has elected to treat the contract as a nullity, and consequently the payment as made without consideration. Public policy protects him from paying what he has lost, but natural justice requires him to refund what he has received. Whilst the event was uncertain, I was entitled to insist upon a return, and the case ought not to be altered to my prejudice, when the event has terminated in my favour. Suppose Titius having lost the money, pays the amount of it, he has no claim to a return; it was due in point of honour; and not having availed himself of the assistance of the law to evade the payment, he is not in this action, which is universally allowed to be founded upon the principles of natural justice, (and he has no other mode of redress) entitled to sue for a repetition.

I shall now advert to the cases which have arisen upon this subject as applicable to void insurances, to illegal wagers, and to annuities void for want of registry.

PART I. *Void Insurances.*

In the case of *Lowry v. Bourdieu*, Doug. 451, the plaintiff made an insurance upon the East India voyage, not having any direct interest in the ship, but being a creditor of the captain by bond, and

The bond being stated as the subject of the insurance. It was one question, whether the chance of losing his debt by his debtor not making a successful voyage, was not an insurable interest, but upon principles not connected with the present discussion. It was rightly held that it was not. After the voyage had been performed, and all risk (supposing the policy valid) was at an end, he brought his action for return of the premium, insisting that as he would not have been entitled to recover in case of loss, it had been paid without consideration. Lord Mansfield's opinion fluctuated upon this case, but he finally held, that the money could not be recovered; observing that insurances without interest, were mere games of hazard, like the cast of a die, and that it was a gaming policy against an act of parliament; and therefore the court would not interfere to assist either party, according to the well known rule, that *in pari delicto, &c.* not that the defendant's right was better than that of the plaintiff, but they must draw their remedy from pure fountains. Mr. Justice Willes differed from the rest of the court. He observed, that it did not appear to him, that the parties had an idea that they were entering into an illegal contract. The whole was disclosed, and they thought there was an interest. This was a mistake: but it was a new point of law. Mr. Justice Ashurst was of opinion against the plaintiff, but his only observation was, that the contract was a gaming policy: not adverting to the cir-

cumstance, that that very supposition was the whole foundation of the plaintiff's claim. Mr. Justice Buller was clear that the plaintiff ought not to recover. There was no fraud on the part of the underwriter, nor any mistake in matter of fact. If the law was mistaken, the rule applied that *ignorantia juris non excusat*. He then adverted to the distinction already stated, between contracts executed and executory; observing, that if the plaintiff had brought his action before the risk was over, and the voyage finished, he would have had a ground for his demand; but he waited till the risk (such as it was, not indeed founded in law, but resting upon the honor of the defendant) has been completely run.—The propriety of this decision seems to be extremely clear, but it is to be regretted that the precise ground of it was not distinctly ascertained; or rather that the judges who concurred in it, did not precisely agree in the ground of their opinion. Lord Mansfield proceeded upon the ground of the parties being *in pari delicto*; and it may be therefore supposed, that the distinction which I have presumed to suggest between contracts which are criminal, and founded upon an immoral purpose, and those which are merely void, as being deprived of any legal efficacy, is without foundation. But I conceive the distinction to be founded upon those principles of natural justice which are principally to be regarded in discussing the right of repetition. The argument of Mr. Justice Willes appears to be

well founded to a certain extent; for whilst the event was uncertain, or if it had terminated in favour of the plaintiff, an innocent mistake of the law, by parties nor having any corrupt intention, might be fairly urged in support of reclaiming what could not produce in point of legal efficacy, the benefit intended; or what from the refusal to complete the contract, appeared to have been paid without consideration. Mr. Justice Buller's opinion, that the mistake of law could afford no excuse, is in opposition to this argument.—I have, in a former part of this essay, discussed the question, how far money supposed to be due by a mistake in point of law, and not due in respect of natural justice, was the subject of repetition, adopting the argument that the nature of the mistake did not prejudice the substantial right. Applying this to the present subject, I conceive that if a man pays a sum of money for some consideration supposed to be the object of a legal contract, but which, by reason of some impediment, could not be effective, there being no criminal or fraudulent motive, it does not furnish any right to the person receiving, to catch at the advantage, and retain the money for which he has given no equivalent. The distinction between executed and executory contracts, seems to be well supported in respect of such contracts as these, which are merely void; and it is here that Mr. Justice Willes appears to have fallen short in his opinion. I say *in such contracts as these*, for if my former observations are correct,

Ev. H



VOID INSURANCES.

the distinction does not hold where a criminal purpose intervenes. The person who paid his money upon the void insurance, might recover it during the voyage, but a candidate who had bribed an elector, could not sue him for a return before the day of election; but when Mr. Justice Buller adverts to the circumstance that the plaintiff waited till the issue, such as it was, resting in the honour of the defendant, had been completely run, we see a principle which puts the propriety of the decision beyond the reach of reasonable doubt. Turning to the case of *Moses and Macferlan*, the grand expositor of the principles upon which this right of action is founded; we see that it was money fairly lost at play, and which the defendant, upon the circumstances of the case, was not obliged by the rules of natural justice and equity to refund. I have deemed it particularly necessary to attempt this analysis of the case of *Lowry and Bourdieu*, as the authority of it is frequently relied upon, and has, I conceive, in some cases been misapplied; more especially in the case of *Andree v. Fletcher*, 3 T. R. 266. A re-assurance was made upon a foreign vessel: this was, upon a special case, adjudged to be void, as falling within the general prohibition against re-assurances; the assured then sued for a return of the premium. His counsel was arguing, that the defendant had received the money without risk, and therefore retained it against conscience. The objection to the plaintiff's recovering must be, that the original transaction was illegal, because

is contrary to a statute; but that statute is merely an act *juris positivi*. In *Martin v. Sitwell*, 1 Str. 156, where the policy was originally void for want of interest, it was held, that the premium was received without any consideration, and was therefore money had and received to the plaintiff's use, which the court held he might recover; and it is immaterial whether the contract be void at common law by statute; for in *Jaques v. Goughly*, 2 Bl. 1073, it was held, that the premium paid for insuring lottery tickets, might be recovered back, though the contract of insurance was void by statute. In *Wharton v. De la Rive, Park*, 428, where an action was brought on an insurance that America would be declared independent within a certain time; Lord Mansfield being of opinion that the contract was illegal, was going to nonsuit the plaintiff on the opening; but it appearing that the defendant had not paid the premium into court, he permitted the plaintiff to take a verdict for that sum. This course of argument seems to be not only judicious and plausible, but a correct examination of legal principles: BUT WHILST THE PLAINTIFF'S COUNSEL WAS PROCEEDING, the court, thinking that this case could not be distinguished from *Lowry v. Bourdieu*, ordered that the *postea* should be delivered to the defendant.—Certainly, if the mere circumstances of the two cases are considered without reference to any expressions used in determining *Lowry* and *Bourdieu*, no cases could be more

VOID INSURANCES.

diffimilar. Lowry paid his money upon a wager; he waited till the wager had been won by Bourdieu, taking the chance of his honour for the payment, in case it had been lost, and then sued to recover his stakes, alledging that Bourdieu, in case of loss, could have availed himself of a legal exception. Andree paid his money upon a wager which he won. Fletcher, who lost it, availed himself, of a legal exception, to avoid paying the loss, and then insisted most unconscientiously upon retaining what he had received as a consideration for that contract, by which he had refused to be bound. In the one case no unfairness whatever could be imputed to the defendant. In the other, no reprobation of the iniquity of the defendant's conduct could be too severe. The cases cited in the argument of Andree and Fletcher, are much more nearly analogous to the principal case, and two of them* are directly in point, (that if a man pays a premium for a contingent engagement, and on account of some legal exception, cannot enforce the engagement, having, according to the terms of it, succeeded, the premium shall be returned,) unless there is some technical distinction between contracts void by the common law, and under a statute, of which I am not aware; (for the distinction between contracts being partially or wholly void, in respect to the acts engaged to be performed, has nothing to do with the present argument.) The case of Jaques v. Golightly, is

* Martin v. Sitwell, and Wharton v. De la Rive.

not equally applicable, for there the defendant was regarded as a person criminally deluding the plaintiff. But it is partially applicable, as that was not the only ground of the decision. The balance upon the account, supposing the transaction to have been legal, was in favour of the plaintiff, and Lord Chief Justice de Grey, is reported to have said, "This is an application for favour, by a man knowingly transgressing." He says, and says rightly, "that the insurance contract was null and void; he has therefore a scruple of conscience, not to pay the money won by the plaintiff, because the play was illegal; but he has no scruple to retain the consideration money." On the other ground alluded to, of criminality and imposition, the defendant would have been compellable to have refunded the premiums, even if the balance had been in his favour,

The right of the assured to recover the premium in the case of *Andree v. Fletcher*, considered according to the principles of natural equity, divested of any positive municipal authority, is still more evident from analogy to the case of an insurance void for fraud. The premium is commonly restored; and, as I conceive, ought always to be so, because, otherwise a penalty would fall on the assured, and an undue advantage accrue to the insurer: the underwriter cannot be defrauded out of his subscription; but having taken the exception, he cannot, without consideration, retain the premium. (There is indeed one case in which

Lord Mansfield said, that the fraud was so gross, that the premium should not be recovered from the underwriter; but if the premium of an insurance defeated for fraud, is to be generally returned gross fraud, or slight fraud, which differ not in principle, but only in degree, it can never make the distinction.)* But if a man, who has advanced his money, intending to defraud another, shall be allowed to sue for a return when the fraud is detected and defeated, though he must necessarily be conscious of acting wrong, (a corrupt intention being included in the very supposition,) how much stronger and more clear, must his case be, who has paid his money upon a contract not naturally vicious, but merely rendered inefficacious for some reason of public expediency, and in

* I find that it has been decided, in the case of *Chapman v. Frazer, Park, Ins. 4 ed. 218*, that in all cases of actual fraud, on the part of the insured, the underwriter may retain the premium. This case is not reported at length; but I cannot think it consistent with general principles. It, at the same time, treats the contract as inducing, and not inducing a risk; since, if there was a risk, the loss was payable; if there was not, the premium was paid without consideration, or it introduces a penal consequence of an anomalous character. The more particular discussion of that question would be foreign to my immediate subject; but allowing the decision to be correct, it only subtracts one detached particular from the argument upon the direct question under consideration.—Whilst this sheet is passing through the press, I have received the report containing the case of *Vandyck v. Hewitt, 1 East, 96*, in which the assured was not allowed to recover the premium on a policy upon trading with the enemy. In that case, there was an illegal act, and the decision accords with what I have submitted to be the true distinctions on the subject.

respect of which, the person receiving the money, has availed himself of an objection, founded upon positive law, and in the private application of it, though perhaps not in the public enactment, contrary to natural justice.

Where one man retains money under circumstances the mere statement of which shews that he unjustly seeks to acquire an adventitious gain to the prejudice of another, every presumption and inclination should be in favour of the rights of repetition, and nothing should be allowed to defeat the substantial claims of justice, except the most direct and imperious authority, or the necessary tendency to introduce a rule which might more frequently produce detriment, by supporting iniquitous demands, than benefit by enforcing such as are just, and incapable of being accurately distinguished in its application to the one case or the other.

PART II. *Of Wagers.*

A wager was laid on the event of a boxing match, and the money deposited in the hands of a third person. One of the parties having lost the wager, gave notice to the stake holder, not to pay over the money, and sued him for his stake; and the court of King's Bench held, that he was entitled to recover. Lord Kenyon took notice, that the action was not brought against one of the parties laying the wager, but a stake holder; and observed, that if the defendant had paid over the

money to the winner, perhaps he would not have been answerable again; but here the money was still in his hands. *Cotton v. Shurland*, 5 M. R.

This case will warrant a slight digression concerning the character of a stake holder and his consequent obligations. It must be allowed, on all hands, that he ought not to be allowed in consequence of money being placed in his hands, upon a contract which is illegal or void, to appropriate it to his own use, but that he is accountable for it in one shape or another. The true way of viewing the case seems to be by considering the deposit of the stakes as a security from the respective parties, and by subjecting the stake holder to the same obligations, and allowing him the same exceptions as would prevail between the parties themselves. If this principle is correct, the following consequences will insue. *Provided the wager is unexceptionable*, and might be enforced between the parties according to the event, the stake holder must retain the money until the event is decided, and cannot liberate himself by returning the deposit to either party in the mean time, except by mutual consent. *If the subject of the wager is illegal and void*, either party may demand a return *before the event* has happened, because the other party could not maintain an action upon the principal contract; nor consequently, after an event in his favour, demand more from the stake holder than his original deposit. *After the event decided*, the losing party may require the

stake holder not to pay the wager to the other, and may sue for what he advanced, for the same reason which was applied to the preceding hypothesis. If the stake holder, without notice from the loser to the contrary, pays the whole to the winner, the loser cannot reclaim his stakes from either of the others, for having fairly lost the money, though the law would not, in case nothing had been deposited, have enforced the performance of the engagement against him; yet, when he has voluntarily fulfilled it, there is nothing unconscientious in the retention, which can afford him a right of repetition; therefore the stake holder, who pays it over by his authority, implicitly given at the time of the deposit, and continuing unrevoked at time of payment, is no further accountable to him. And the receipt of the winner, from the stake holder acting under such authority, is equivalent to a receipt from the loser himself; and the payment is equally valid*. If the winner demands the money, the stake holder may elect to pay each party his deposit, and the winner can found no claim against him for the money won upon the void contract: but if the loser consents to the payment, no objection can be made by the stake holder; as a man may, without consideration, voluntarily direct the application of his money in the hands of another. And if the stake holder is justified in paying the money won, unless

* Since the above was written, the point has been so determined. *Vi. Howson v. Hancock*, 8 T. R. 575.

he has notice to the contrary, he is necessarily compellable to pay it when there is an express consent by the only person interested to oppose.

A recent case, which appears to have been rightly decided, may from the observations with which it was accompanied, and a mistake in those reporters, to whose general accuracy the public are so much obliged, lead to erroneous conclusions. The plaintiff paid 100*l.* upon condition to be repaid 300*l.* if peace was not made before the 11th of September, 1797. Having sued for the breach of the agreement, and upon the common count, for money had and received, it was admitted on the trial, that the wager was illegal, and that the 300*l.* could not be recovered; but by the direction of Lord Kenyon, the plaintiff obtained a verdict for the money which he had paid. According to the report of the case, it was argued as if the action had been brought not by the winner, but by the loser; and Lowry *v.* Bourdieu, was relied upon as an authority, to shew that the party should make his option to rescind the contract while it was executory; otherwise he first takes the chance of the event happening in his favour; and when that is decided against him, he turns round, and insists upon the illegality of the contract. But the court confirmed the verdict; and said it was more consonant to the principles of sound policy and justice, that wherever money had been paid upon an illegal consideration,

It might be recovered back again by the party who had thus improperly paid it, than by denying the remedy to give effect to the illegal contract; and the marginal abstract of the report is in these words:—"If a sum be deposited upon the event of an illegal wager, the loser *may recover back* his deposit after the event of the wager." *Lacause v. White*, 7 T. R. 535. Now it is notorious, both on account of the publicity of the subject, (the event in question not having yet taken place after the lapse of several years) and from the action being originally framed to recover what had been lost, that the action was brought not by the loser, but the winner of the wager. It was diametrically opposite to the case of *Lowry v. Bourdieu*, in which the plaintiff endeavoured to recover back the premium which he had lost by the terms of the contract, and similar in circumstance, but contrary in determination to *Andree and Fletcher*. The loser of the wager availed himself of the illegality of the contract to avoid performing his engagement, and in addition to this, he wished most fraudulently to retain what he had received as the consideration for a contract that he had elected to vacate, and which therefore was, in effect, paid without consideration. It is therefore by no means to be inferred from this decision, that if the event had been otherwise, peace had been concluded, the plaintiff could have recovered the deposit, which it was no wise contrary to honour, or justice in the defend-

ant to retain. The report being substantially wrong, very little stress can be laid upon the supposed expression, that whatever money has been paid upon an illegal consideration, it may be recovered back, as that expression thus indefinitely applied, and still more as applied to the particular case, is in opposition to the authority of preceding cases, and to the general opinion of those who have investigated the subject, by tracing it to its original principles of natural justice.

PART III. *Of Annuities.*

The annuity act having vacated the securities for life annuities, which are not registered according to the directions therein prescribed, many contracts have been frustrated by the mere unskillfulness of those who intended fully to comply with the provisions of the law. An annuity having been set aside for the insufficiency of the memorial, the court of King's Bench decided, that the annuitant might sustain the action to recover back the consideration money, for which it had been granted. Mr. Justice Ashurst said, in delivering the opinion of the court, that as the security was not set aside for any fraud in the transaction, but merely for a mistake or omission in form, it became unconscientious in the party to retain it, and it was therefore recoverable as money had and received to the plaintiff's use. *Shove v. Webb*, 1 T. R. 732. Mr. Powell, in his treatise on the law of contracts,

questions the rectitude of this decision. He founds his argument upon an analogy to the distinctions which have been upon the statutes of gaming. The statute 16 Char. II. enacts that all *contracts* for money exceeding 100l. lost at play, and all *securities* for it shall be void. The 9th of Anne provides that all *securities* for money lent to play with, shall be void. And upon the latter act, which only declares that the *securities* shall be void, it is held, that the contract arising from the loan, shall be obligatory; and as the annuity act only directs that if there is not a registry as prescribed, every *assurance* shall be void without adding that the *contract* for the annuity shall be void, Mr. Powell infers, that notwithstanding all the *assurances* are vacated, the contract may subsist; and that therefore the supposition of the consideration for which the money was paid, having failed, is founded upon a mistake, as such consideration may remain in the subsistence of the contract, notwithstanding the invalidity of the assurance given for its performance; and he observes, "That a contract should fail of effect, for want of the party claiming a benefit by it being capable to substantiate it by legal evidence, is not unusual, yet in such a case he can have no relief in law or equity." This reasoning seems to me to be chiefly founded upon an analogy which is merely verbal, and extremely fallacious. The loan of money is an *act* in its nature producing an obligation independant of any verbal declaration, and there is nothing in-

ANNUITIES.

consistent in the obligation being allowed to subsist, notwithstanding the invalidity of some adventitious engagement, by which the performance of it was intended to be more effectually secured; whereas an obligation solely arising from an express engagement, and necessarily rendered ineffectual by the assurance for its performance being defeated, cannot, in reason or justice, be deemed to subsist for a collateral purpose, when it no longer subsists in respect to its original object. There is also a manifest difference between the accidental circumstance of a failure of evidence, and the express and positive defeasance of the engagement itself. If it could be shewn that notwithstanding the defeasance of the assurance, the contract for the payment of the annuity might, in its nature, subsist as an obligation, which could be legally enforced. I admit the reasoning in question to be correct; but if they are so identified, that the subversion of the one necessarily induces the extinction of the other, in point of legal efficacy, any argument resulting from the supposed existence of the contract, must lead to consequences inconvenient and unjust. I agree with Mr. Powell, that no distinction is made between an annuity being defeated from the consideration being rendered void from a formal defect. This distinction, though mentioned by the learned judge, whose opinion has been cited, did not necessarily form an ingredient in the decision. I think that in neither the one case or the other ought the consideration to be retained.

Mr. Plowden, in his treatise on annuities, strongly controverts the opinion of Mr. Powell, that the contract for the annuity can subsist when the assurance is vacated ; but upon another ground, he adopts the same conclusion of the annuitant having no right to reclaim the consideration money. He says, " If we reflect that the only motive which can induce a person to yield to the ruinous terms of selling an annuity at the present market price, which varies widely from the real value, is to avoid being thrown into goal for the non-payment of a sum of money larger than he has means to command, and having therefore contracted with his creditor to satisfy him ; and the creditor having consented to be satisfied with a species of payment by instalments, which every annuity is." [This I deny ; a payment by instalments relates to a precise sum to be absolutely paid in a given number of parts, an annuity is wholly uncertain, it may be much, or it may be nothing]. " The legal and equitable question hereupon arises, can the creditor, by his own neglect, laches, means, or procurement, without the consent or concurrence, and greatly to the prejudice of the debtor, annul at will the annuity, securities and contract, and drive the debtor back to his original desperate situation, of owing a debt which he cannot discharge, and for emerging out of which he had legally contracted with his creditor, to pay such an exorbitant consideration annually during his life. This is neither the case of an estate sold under a bad title, nor of

ANNUITIES.

money borrowed under void securities. In the first of these cases the vender must return the purchase money, but he takes back the estate; in the second having borrowed, and actually received a specific sum which the other lent, (and every loan is a contract for repayment) he must either repay or effectually secure; and in neither case is he injured, and in both he must do justice. But in case of an annuity, the vender appears actually to contract with the purchaser, that he shall never be liable to be called upon for the principal; particularly at the will of his creditor, who, on his side, shall not profit of his own contempt or neglect of the law." A great part of this reasoning will be answered, by admitting that a man who has neglected to take the measures prescribed by law, for securing his annuity, or to speak more correctly, who has fallen into some mistake in endeavouring to comply with the requisits of the law, shall not be allowed in the first instance, to adduce his own neglect or mistake as a ground of prejudice against the opposite party: he shall not alledge that in consequence of a blunder in the registry, he will no longer receive his annuity, but reclaim his principal, any more than a person who has made a fraudulent insurance, shall come in the first instance, and shewing that by his own fraud the policy was void, insist upon the premium being retained; but when the other party has taken advantage of the invalidity of the contract, has found out some formal, technical objection, and

refused, in consequence, to adhere to his engagement, can it be contended that he has any right, in point of natural justice, to retain the money that he received for a purpose which he refuses to execute? By the protection of the law he shall not be placed in a situation which he considers less advantageous, than if his engagement had not been made; but shall he be therefore enabled to put himself in a better situation, than if there had been no engagement at all, by the amount of the money which he wishes to retain? He shall not be injured; but shall he therefore be allowed to defraud? And as to any suppositious agreement of not reclaiming the principal, it is an essential part of the supposition that the annuity will be duly paid; it is blowing hot and cold to adopt one part of the supposition and reject the other. If the grantee of the annuity does not properly provide for its security, let the grantor avail himself of positive law and avoid it; but let him not at the same time retain the purchase money, and withhold the annuity: more especially let not the conduct of the man who requires to be paid either the one or the other, who only *certat de damno vitando* against the other, *qui certat de lucro captando*, be the object of reproach. I have not in the course of private practice, had much opportunity of making observations upon this subject; but the cases which come before the courts of justice, much more frequently evince a disposition in the seller of the annuity, fraudulently to defeat his deliberate engagements,

than in the purchaser to harass or oppress the seller. When it is supposed that the under value at which these contracts are obtained, is to throw all the favour on one side, I cannot help doubting the truth of the fact. The market value of most commodities, and the real value, are synonymous terms, according to the well known test of Hudibras. If the purchases were necessarily attended with the great advantages supposed, the price would rise by the influx of competitors, until a real level was upon the average attained. In annuities the market value is not the calculated value, merely taking into the account the rates of compound interest and insurance: but the market value being so much below the calculated value, seems to shew that the latter is not the real value, when every circumstance, particularly the disposition so prevalent in the sellers of annuities, to cheat if they can, is taken into consideration.

Subsequent to the decision of Shove and Webb, it was ruled by two of the judges, who concurred in that decision. Mr. Justice Buller, and Mr. Justice Grose, contrary to the opinion of Mr. Justice Ashurst, that a *surety* for the payment of the annuity, was not upon its being vacated for want of enrolment, liable to refund the consideration money, although he had joined in signing a receipt for it. *Stratton v. Rustall*, 2 T. R. 366. From some of the expressions used by the two learned judges, Mr. Plowden infers, that this case cannot be reconciled with the former, but neither of those

judges intimates the slightest opinion that their former decision was incorrect. They proceed wholly upon the character of the defendant as being a mere surety for the payment of the annuity, and upon his not having in fact received any of the money which he was required to refund. Holding that he was not concluded by the act of signing the receipt, although that would have been *prima facie* evidence against him. This ground of decision is perfectly consistent with the compelling a person to refund a sum of money which he has actually received for an engagement, that he has thought proper to vacate, notwithstanding his power to vacate it arises from the neglect of the other party.

The observations which have been made respecting money paid upon the contracts particularly referred to, can easily be applied to other cases dependant upon the same general principles.



CHAP. V.

Of Cases in which the action is not maintainable.

I SHALL now advert to some cases, in which the action for money had and received, is not maintainable.

SECTION I. *Miscellaneous Cases.*

A forged bill was drawn upon Price, in the name of *Sutton*, and Price supposing it to have been really drawn by *Sutton*, paid the amount to *Neale*, a fair endorsee. Afterwards, upon the forgery being discovered, he sued for a return. After the plaintiff's counsel had been heard, Lord Mansfield stopped the counsel for the defendant, saying, it was one of those cases which could never be made plainer by argument; it is an action upon the case for money had and received to the plaintiff's use, in which action the plaintiff cannot recover the money, unless it be against conscience in the defendant to retain it, and great liberty is always allowed in this sort of action; but it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange endorsed to him upon a fair and valuable consideration, which he had *bona fide* paid without the least privity, or suspicion of any forgery. Here was no fraud—no wrong. It was incumbent on the plaintiff to be satisfied that the bill upon him was in the drawer's hand before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. His lordship pointed out some circumstances of neglect on the part of the plaintiff, by which the defendant was encouraged to take the bill, and said, "It is a misfortune which has happened without the defendant's fault or neglect." If there was no neglect in the plaintiff, yet there is no reason to throw off

the loss from one innocent man to another innocent man : but in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant. *Price v. Neale*, 3 Bur. 1354.

A lottery office keeper brought an action for the repetition of what he had paid upon illegal insurances. It was first supposed that he had been the defendant in the cause; and much of the discussion proceeded upon that ground, to shew the right of the person to recover, who had been unwarily induced to pay his money for such insurances, and that that person was not implicated in the criminality of the contract; but when it occurred that the contrary was the case, so that the plaintiff was not only in *pari delicto*, but also stood in the light, and under the description of that species of insurer, from whom the statute meant to protect the unwary : the court were of opinion that he could not recover. *Browning v. Morris*, Cowp. 799.

A person borrowed money upon a respondentia bond, which was void by positive statutes. The executors paid a sum of money in discharge of the bond, and afterwards they brought an action to recover it back, but it was decided against them. Lord Kenyon said, that he thought the executors were bound, both in honour and conscience, to refund the money which had been advanced, though the original contract were contrary to a positive law; for it was not a penalty, but money, which the de-

defendants had actually advanced; and the original contract was not *malum in se*, but *malum prohibitum*. Though the security on which this money was borrowed was void by the statute, he did not know but that an action for money had and received, might have been maintained to recover back the money; but the ground on which he went was, that there was no misrepresentation, nor any improper conduct in the defendants, to extort the money from the plaintiffs; but the plaintiffs knowing the whole transaction, and the law also, as they were bound to know*, voluntarily paid it. There was nothing contrary to conscience in the defendants receiving the money which they had advanced; the plaintiffs, therefore, are not entitled, either in law or in equity, to recover it back again. *Munt v. Stokes* 5 T. R. 561. The executors, in the preceding case, appear to have paid rather less than the principal sum advanced; but for what reason, is not stated. I cannot think that the respondentia interest or premium, if paid, could have been reclaimed. It was admitted, that if the money had been paid by the borrower himself, there would have been no right of action.

Many other instances might be adduced, in,

* This observation can only allude to that general knowledge of the law, which every man is presumed to possess; but an inference, deduced from such general knowledge, would be contrary to the principles adopted in an early part of the present Essay; and in respect of which, the direct authority of the noble and learned Judge, would outweigh the effect of an incidental remark, not forming the basis of his judicial determination.

Which there would be no right to reclaim money that could not originally have been recovered by legal process, but which was paid in pursuance of a moral obligation, or for the payment of which there was some real and probable subject. The general principle, recognised in all the authorities upon the subject, can easily be applied to the variations of particular cases.

SECTION II. *Of Money paid by way of Compromise.*

Here it will be proper to refer to the payment of money by way of compromise. "From the principle that there is no ground of repetition, when there is a real and probable cause of payment, it follows," (says Pothier,) "that if for the purpose of avoiding a contest which has arisen, or is likely to arise between you and me, respecting what you insist, though without foundation, to be due from me to you; I pay you a part of the demand by way of compromise, when in fact I owe nothing, I have no right of repetition, because there was a real subject of payment in the preventing a law suit. This rule only applies, if the compromise is unattended with any fraud which renders it void; as if you had used any improper artifices to draw me into it." He adds, "or if the compromise does not take place until after judgment in the last resort, which is conclusive upon the matter in dispute, and of which we are unapprised."

It is held, that a sum of money cannot be re-

CHAP. VI.

On the Effect of judicial proceedings.

POTHIER having discussed the effect of a compromise, as was shewn in the preceding chapter, goes on to say, "If I cannot reclaim what I paid without its being due by way of compromise, the reason is much more strong for precluding me, when I have actually been condemned to pay by a legal judgment; for the judgment in this case, forms a civil obligation. *Propter auctoritatem rei judicatae repetitio cessat.*---D. Mand. 59. *Pecunia indebita per errorem non ex causa judicati soluta esse repetitionem jure conditionis non ambigitur.*—Cod. de condic. indeb. 1. This, as a general rule, is essentially necessary to support the authority of judicial proceedings, and contests would be infinite, if a case once decided, could, in a collateral way, be again brought into controversy.

The case of *Moses v. Macferlan*, 2 Bur. 1005, is of great utility, as it expounds with so much accuracy and perspicuity, the general principles which regulate the action for money had and received; but the immediate decision of that cause, if not a deviation from the rule at present under consideration, is a very strong exception to it. The payee of several promissory notes, under 40s.

each, endorsed them over, for the purpose of recovering against the drawer. The endorsee agreed, that the payee should not be liable to the payment of the money ; but afterwards sued him as endorser, in the court of Conscience, for the amount. The court of Conscience rejected the evidence of this agreement, thinking they had no power to judge of it, and decreed the money to be paid. It being paid accordingly, the payee brought his action in the court of King's Bench, for money had and received, and it was ruled that he was entitled to recover.

Lord Mansfield admitted it to be most clear, that the merits of a judgment could never be overhauled in an original suit, either at law or in equity. He said, " Till the judgment is set aside or reversed, it is conclusive as to the subject matter of it, to all intents and purposes. But the ground of this action is consistent with the judgment of the court of Conscience ; it admits the commissioners did right. They decreed, upon the endorsement of the notes by the plaintiff, which endorsement is not now disputed. The ground upon which this action proceeds, was no defence against that sentence : it is enough for us that the commissioners adjudged they had no cognizance of such collateral matter. We cannot correct an error in their proceedings, and ought to suppose what is done by a final jurisdiction, to be right : but we think the commissioners did right in refusing to go into such collateral matter ; otherwise, by way of defence,

against a promissory note for 30s. they might go into agreements and transactions of great value, and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account. The ground of this action is not that the judgment was wrong, but that, for a reason which the now plaintiff could not avail himself of against that judgment, the defendant ought not, in justice, to keep the money. And at Guildhall I declared, very particularly, that the merits of a *question*, determined by the commissioners, where they had jurisdiction, never could be brought over again in any shape whatsoever. Money may be recovered by a right and legal judgment, and yet the iniquity of keeping that money, may be manifest, upon grounds which could not be used by way of defence against the judgment. Suppose an endorsee of a promissory note, having received payment from the drawer or maker of it, sues and recovers the same money from the endorser, who knew nothing of such payment. Suppose a man recovers upon a policy, from a ship presumed to be lost, which afterwards comes home; or upon the life of a man presumed to be dead, who afterwards appears; or upon a representation of a risk deemed to be fair, which afterwards comes out to be grossly fraudulent.

“The admission that an action might unquestionably be brought upon the agreement, is a decisive answer to any objection from the judgment; for it

is the same thing as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received, or upon the agreement itself, that besides refunding the money, he may pay the costs and expences the plaintiff was put to."

The present Chief Justice of the King's Bench, has lately adverted to this opinion being received with considerable dissatisfaction by the profession; and it certainly is a proposition very difficult to maintain, "*that a sum of money, paid under the direct authority of a court of competent jurisdiction, may be reclaimed as unduly paid.*" That a person should be judicially compellable to pay a sum of money; and as soon as he has paid it, should be allowed to institute another suit to recover it back again. The inferior quality of the court does not seem to induce any substantial difference; and the same rule which could be applied to this small sum of money, recovered in the court of Conscience, must be equally applicable to a recovery of the largest demand in any of the courts of Westminster.

It is said, to be *sufficient that the commissioners adjudged they had no cognizance of such collateral matter*; but if they had such cognizance, and the matter could be proper ground of defence, their erroneous opinion to the contrary, could not convert

that ground of defence into a substantive cause of action to defeat the judgment upon the immediate claim before them. The opinion *that they did right*, is also very questionable; for if there is any legal defence to the supposed cause of action, that defence must be equally available in one court as another: and though the power of a court of Conscience only extends to debts under 40s.; if any circumstances are material to shew that such debt under 40s. is not due, although these circumstances relate to transactions of the greatest value, they ought to be fully considered. The discussion of them does not import a right of deciding matters not within the jurisdiction; it is merely an examination of evidence relating to the demand which is regularly before them, and there can be no pretence for contending that an endorsee of a promissory note can maintain an action against the endorser, for whose use, and on whose account, and as whose agent he has received it, with the express engagement that the endorser should not be molested thereon.

In the several cases supposed by the illustrious judge, there would be iniquity in keeping the money; but I do not think there could be any ground for maintaining an action for money had and received. Indeed any reference to them is only proving *idem per idem*. The supposition, that a man who has recovered money, by a regular judgment, can be compelled in this way to refund on account of a matter of defence afterwards discovered, is contrary

to all practical experience ; and it would be very difficult to draw the line which should settle what was a final adjudication.

As to the jurisdiction of courts of equity in giving relief against judgments at law, it is a regular known proceeding : though it is not formally an appeal, it is a corrective power attended with the same effects ; and being a special jurisdiction, essentially different from that possessed by courts of law, ought not to be drawn into consequences foreign to the objects of its institution.

It may be difficult satisfactorily to distinguish the right of bringing an action on the agreement, and an action for money had and received ; but the former attached immediately upon the institution of the suit ; the money paid would be evidence to shew the amount of damages upon violation of the agreement. There may be several instances in which a suit may be brought contrary to an agreement, and yet the agreement be no defence in the suit ; as if there is a covenant not to sue within a given time ; if there are two obligors, and there is a covenant not to sue one of them ; if there is a covenant not to sue generally it may be used as a release to defeat the action ; but having another power and efficacy, as an agreement, I do not think that a recovery in the action would be a bar to an original suit, directly founded upon the violation of the agreement. Whether the setting up such an agreement may be

allowed to shew that money recovered under a regular judgment was unduly paid, and directly subject to repetition, is a very different question. Whether the one mode of proceeding or the other may be more beneficial to a defendant, is a question not of sufficient magnitude to permit the subversion of a fundamental rule of law to depend upon the exposition of it*.

A recent determination of the King's Bench, goes a great way to destroy the authority of *Moses and Macferlan*, and certainly is a stronger instance of the right of repetition, being precluded in respect of money paid under a judicial proceeding. *Hampton* brought an action against *Marriott*, for goods which had been before paid for, and a receipt given; but *Marriott* not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit, and pay the money again. He afterwards found the receipt, and brought an action to be repaid the money so wrongfully obtained, but was not allowed to recover. *Moses and Macferlan* was cited in his favour, as was a subsequent case, not reported, of *Livesey*

* At the time of making the above observations, I was not aware of a similar course of argument having been taken by Lord Chief Justice Eyre, in the case of *Philips v. Hunter*, 2 H. B. 402. His opinion upon that particular case was contrary to that of all the other judges of England, but the grounds of decision, upon which the other judges proceeded, were perfectly collateral to the subject of our present enquiry.

and Rider, where a similar action was held to be maintainable. Lord Kenyon said he was afraid of such a precedent: if the action could be maintained he knew not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there could be no security for any one. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial, and they are as often refused, but this goes much further; and Mr. Justice Lawrence said, that if the case cited be law, it goes the length of establishing this, that every species of evidence which was omitted by accident to be brought forward at the trial, may still be of avail in a new action, to overhale the former judgment, which is too postposterous to be stated. 7 T. R. 269.

In a former case, an endorsee of a promissory note had obtained interlocutory judgment; and a sum of money was therefore paid under a compromise. It afterwards appeared, that the plaintiff had taken the note, knowing that it was given upon an illegal consideration, and an action was brought, reclaiming the money paid. And an objection being made that this action was, in effect, to put the same sum in litigation a second time; Lord Kenyon over-ruled it on the ground that the money had been paid under a compromise, and not under the judgment of a court. The case was brought before the court of King's Bench on a question of evidence, but no discussion took place

Ev.

M

there as to the right of action. *Cobden v. Kent-
wick*, 4 T. R. 431.

It has been stated in the preceding chapter, that money, paid under a compromise, is not subject to repetition; but the case last cited, may furnish an exception on the ground of fraud.



CHAP. VII.

By what Persons the Action may be maintained.

WITH respect to the persons by whom the action may be maintained; if my factor pays a sum of money on my behalf, erroneously supposing it to be due, the right of repetition belongs not to him but to me. If a person paid his own money in my name, and on my behalf, he was allowed by the Roman law, to sue immediately for the repetition, if the money was not due, without having recourse to the circuitry of suing me, and leaving me to sue the party who had received it, with which determination I conceive the law of England would coincide; and this right of repetition is still more evident if I disavow the payment; for otherwise he would be wholly destitute of redress, not having any claim against me. But it is competent to me to sue in my own name, for money paid on my behalf, though without my authority. Such was the case of *Ancher* and the *Bank of Eng-*

land; Doug. 637. The drawer of a bill was allowed to recover the money which a friend had paid for his honor, and for which the drawer, under the circumstances of the case, was not liable.

In a case where a brewer's clerk had paid his master's money in illegal lottery insurances, the master was allowed to recover it back. Lord Mansfield (being then of an opinion which he afterwards changed, that nothing could be recovered back by the person who had himself paid money upon such insurances) said, he thought that the plaintiff did not sue as standing in the place of his clerk, for the money and notes, which his clerk paid to the defendant, were the identical money and notes of the plaintiff. "Where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* to a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. It is of public benefit and example, that he should; but otherwise if they cannot be followed and identified, because there it might be inconvenient, and open a door to fraud. Here the plaintiff sues for his identical property, which has come to the hands of the defendants iniquitously and illegally, in breach of the act of Parliament. Cowp. 197.

CHAP. VIII.

Against what Persons the Action may be maintained.

AS to the persons against whom the action may be brought, there is some difference between the civil law and the decisions of the English courts, upon the point of a person being individually liable to refund what he may have received as agent for another. According to both systems of jurisprudence, the principal is liable for what has been paid to his agent on his behalf, and by his authority. But in the civil law the agent was not liable if the principal ratified the payment, even if the agent derived an advantage from it; as by being discharged from bringing it into account. *Si procuratori falso indebitum solutum sit, ita demum a procuratore repeti non potest si dominus ratum habuerit, sed ipse dominus tenetur. Dig. de condic. causa, &c. 14. His solis pecunia condicatur, quibus quoquomodo soluta est non quibus proficit; de condic. indeb. 49.*

In the case of *Jacob v. Allen*, 1 Salk. 27, a person received money as attorney, for an administrator, and paid it over to him. The administration being repealed, an action was brought against the attorney, by the executor; and it was objected that the defendant acting only as attorney for him that was in fact administrator, it was the receipt of the

administrator, and not of the defendant ; but Lord Chief Justice Trevor, before whom the cause was tried, disallowed the objection, for the administration was merely void, and consequently the administrator could give no authority ; and so the attorney acted without authority, and then there was nothing to hinder the raising an implied contract. But Lord Chief Justice Holt, in the subsequent case of *Pond v. Underwood*, 2 Lord Raymond, 1210, made a contrary decision ; for though all acts done by an administrator where there is a will, are void, it was hard to make the defendant liable, having paid the money over to the administrator before he knew of the will.

Where an action was brought against a person to refund a sum of money, which had been paid to him as receiver for Lady Windsor, and for which a receipt was taken as paid for the use of Lady Windsor, Mr. Baron Perrot, before whom the cause was tried, was of opinion, that the action did not lie ; that nothing could be more absurd than to make the collector or receiver of another person, liable to an action for every payment that was voluntarily made to him, and to leave him to be defended or deserted by his principal, as such principal should think fit : that if the action lay in this case, it would lie against every attorney, who by his client's direction, should demand and receive money as due to his client, which the supposed debtor might voluntarily pay, and afterwards think fit to dispute. He thought that if the money had

been paid over to Lady Windfor, the plaintiff might easily prove it; and if it was not paid over, yet the payment to her receiver was payment to her; and therefore the action might be brought against her. He referred to an action brought against Mr. Kynaston's collector, to recover back a sum paid for tithes, wherein Lord Chief Justice Lee nonsuited the plaintiff upon the principle that the right to an inheritance should not be tried in an action for money had and received against the collector. But, whether the money had, or had not been paid over to his principal, that could not be the ground of Lord Chief Justice Lee's opinion, being merely a matter in the knowledge of the principal and receiver, and to make the action maintainable or not, just as the fact should appear on the trial, would make this kind of action a trap for the plaintiff. The case being brought before the court of King's Bench, they were of opinion, that the action ought to have been brought against Lady Windfor, and not against her agent; that the action for money had and received, was a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action. This money was paid to the known agent of Lady W. He was liable to her for it, whether he had actually paid it over to her or not, he received it for her; and Lord Mansfield expressed a dissent to the case of *Jacob v Allen*, and his approbation of *Pond v. Underwood*. He

said he kept clear of all payments to third persons, but where it is to a known agent, in which case the action ought to be brought against the principal, (unless in special cases, as under notice or *malu fide.*) 4 Bur. 1984.

In a subsequent case, a sum of money was paid to the defendant as agent for the parties interested under a policy of insurances who on the same day, passed it in account to his principals, and gave them credit for it against a larger sum, in which they were indebted to him. On a subsequent day, the underwriter gave the defendant notice that it was a foul loss. The defendant had then accepted no fresh bills, advanced no sum of money, nor given any fresh credit to his principals. On the trial the question was considered to be whether having placed this money to the account of the principals, was equivalent to a payment over? And Lord Mansfield, in reporting the evidence said, that in general the principle of law is clear, that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it, because it is just that one man should not be a loser by the mistake of another, and the person who made the mistake, is not without redress, but has his remedy over against the principal. On the other hand, it is just that as the agent ought not to lose, he should not be a gainer by the mistake; and therefore, if after the payment so made to him, and before he has paid

the money over to his principal, the person corrects the mistake, the agent cannot afterwards pay it over to his principal, without making himself liable to the real owner for the amount ; but the present case turns upon this, that the agent was precisely in the same situation at the time the mistake was discovered as before ; and in conscience the defendant is not entitled to retain the money. After argument by counsel, his lordship in addition, observed, that the defendant had trusted his principals, and given them credit. He trafficked to the country, where they lived, and had had agents there, who knew how to get the money back. The plaintiff is a stranger to them, and never heard of their names. [This cannot be literally true ; for then the defendant would have been, to all intents and purposes, so far as related to the plaintiff's claim, not an agent, but a principal.] Is it conscientious then (he said) that the defendant should keep the money which he has got by their misrepresentation, and should say, though there is no alteration in my account with my principal, this is a bit. I have got the money, and I will keep it ? If there had been any new credit given, it would have been proper to have left it to the jury to say, whether any prejudice had happened to the defendant by means of this payment : but here no prejudice at all is proved, and none is to be inferred. Under these circumstances, the defendant has no defence in point of law, and in point of equity and conscience, he ought not to retain the money in question. A new trial was

accordingly granted. *Buller v. Harrison*, Cowp; 565.

The following observations have occurred to the writer of the present essay, as applicable to the preceding case. It is admitted, that no fraud or misconduct was imputable to the defendant; and it is clear, that between two innocent persons, a court of equity, or a court of law, in the equitable action for money had and received, should stand neuter. Supposing the plaintiff had, under the same mistake, paid the money to the holder of a bill of exchange, or by special direction, to any creditor of the insured, or had made the loss the ground of a promise to a third person; or even if such promise or payment had been made to the agent himself in his character of a creditor; in any of these cases the plaintiff would be bound. The case would certainly be the same if the agent had *bona fide* paid it to his principal, and had immediately received it again. And the present case appears only to differ from that in circumstance and the want of circuitry, and not in substance and effect. It is to avoid circuitry that a retainer is deemed equivalent to a payment. The argument urged by the defendant's counsel that the agent would be lulled into security, is apparently supported by the principles of reason and justice; for no man who had lawfully received a sum of money on behalf of his debtor, would institute a process, or have recourse to any other measure, for the recovery of his debt, when a decisive answer could be

Ev.

N

given by setting off the money which he had received. According to the rules of the civil law, which appear to be founded in natural equity, whenever a person who is creditor of another for a given sum, becomes his debtor to the same amount or in another sum, capable of being brought into compensation, the compensation takes place, and the respective debts are extinguished so far as they concur, by the mere force of the law of compensation. In the English law, a defendant is not bound to avail himself of the statutes of set off, and may pay the debt which he owes, and maintain an action for the mutual demand; but as every man would in general consider an indisputable right of set off, as equivalent to an actual payment, this technical distinction does not seem to affect the general principle, as it is founded in substantial justice.

It is observable, that in the civil law there was no distinction founded upon the circumstance of a payment over; the payment was considered as made to the principal, and the agent only regarded as an instrument of transmitting it.

An action was held to be maintainable against an auctioneer for a deposit; the sale being objected to upon sufficient grounds by the purchaser, as the money did not appear to have been paid over by him to his principal; but even if it had, as the objection was made before it either had, or ought to have been paid over, he was held to be a stake

holder, a mere depositary of the money, who ought not to have parted with it till such time as the sale should be finished and completed; and, it should appear in the event to whom it properly belonged. *Borough v. Skinner.* 5 Bur. 2639.

In a very late case the broker, on a policy of insurance, received the money from the underwriters, and refused to pay it over to the assured, alleging that the voyage was illegal; and as he was a stake holder, the plaintiff's right was not greater against him than against the underwriters, and he must stand in the same situation as if he had immediately sued them. Mr. Justice Buller said, "is the man who has paid over money to another's use, to dispute the legality of the original consideration? Having once waved the illegality, the money can never come into his hands again. Can the defendant, then, in conscience, keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it, but the plaintiff?" To which Lord Chief Justice Eyre added, "The defendant is not like a stake holder. The question is, whether a man who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think not." *Bos. and Pul.* 3.

If a person receives in my name, and on my behalf, a sum of money, which the party paying it supposes due from him to me, the payment can

not be deemed to have been made to me, unless I either gave a special authority for receiving it, or ratify and assent to the payment, as being made on my account. If I disavow it, the action cannot be sustained against me, but only against the person to whom the payment was actually made.

Pothier says, that this rule applies even when the person to whom the money is paid, has a general procuration; for such procuration imports an authority to receive what is due, but not to receive what is not due; therefore, if he receives what is not due, or more than is due, I may disavow the payment, and the action can only be brought against the receiver. I conceive that this observation can only be assented to with some qualification, for a receiver of rents, a clerk in a counting house, and other persons of similar characters, might be deemed to receive any sums of money paid to them as such, by virtue of a sufficient authority from their principals.



CHAP. IX.

Of the Damages.

THE same liberality which governs the nature of this action will also regulate the amount of the

damages to be recovered. Thus when an action was brought against a person who had received a sum of money for another, it was held, that he might retain a proper compensation for his trouble in receiving it. Lord Mansfield said, "The plaintiff can recover no more than he is in conscience and equity entitled to, which can be no more than what remains after deducting all just allowances, which the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross demand, or mutual demand, or mutual debt, it is a charge which makes the sum of money received for the plaintiff's use, so much less. 4 Bur. 2134.

In the case of *Dutch v. Warren*, a sum was paid for the transfer of stock, and the stock not being transferred, the plaintiff was only allowed to recover the value of the stock, which was less than the money paid. It, as Lord Mansfield said in *Moses v. Macferlan*, the stocks had been considerably higher, the damages could only have been given for the money paid. No redress can be had in this form of action for consequential damages arising from the non performance of an agreement. And it has been very lately determined, that in an action for money had and received, the plaintiff can recover nothing but the net sum received without interest. *Walker v. Constable*, 1 B. P. 306.

It seems however difficult to reconcile these two

decisions, more especially the last, to the principles of general reasoning. Where one party, by his refusal to complete a contract, gives the other a right to treat the contract as nullity; why should that right, which is allowed in its nature, be restricted in its extent?

And though a recovery of incidental damages for the non-performance of a contract, would be repugnant to the nature of an action founded upon the disaffirmance of such contract, it is by no means a necessary consequence of that principle, that damages should not be allowed in respect of the interest of the money improperly detained; and this observation, in respect of the action, as it is brought for restitution of money unduly paid, and which is founded upon a legal fiction, will be more forcible where the allegation, which is commonly formal, is literally true; when money is actually received by one man for the use of another, and instead of being paid over, is placed at interest, or employed in business: but if there is a technical rule which governs the action in general, it would be incorrect to dispense with the application of it in particular cases.

Supposing it should appear upon re-consideration, that the rule is merely founded upon practice, and not supported by principle, it may be important to attend to the observation of Lord Mansfield, in the case of *Robinson and Bland*, as reported in 1 Bl. 256, that where an error has been established, and has taken root, upon which any

THE DAMAGES.

Rule of property depends, it ought to be adhered to by the judges, till the legislature thinks proper to alter it, lest the new determination should have a retrospect, and shake many questions already settled; but the reforming erroneous points of practice, can have no such bad consequences, and therefore they may be altered at pleasure, when found to be absurd or inconvenient.

THE END.

CONTENTS

INTRODUCTION	1
CHAP. I.— <i>Of Money paid by Mistake</i>	7
SECTION I.— <i>Mistakes of Law</i>	ib.
II.— <i>Mistakes of Fact</i>	15
CHAP. II.— <i>Money paid on a consideration which has failed</i>	17
SECTION I.— <i>Failure by Misconduct of the Defendant</i>	ib.
II.— <i>Failure by change of Intention in the Plaintiff</i>	19
III.— <i>A Failure from Accidental Circumstances</i>	20
CHAP. III.— <i>Money paid through imposition or extortion</i>	23
IV.— <i>Money paid on Illegal Contracts</i>	25
SECTION I.— <i>Contracts attended with Criminality, Turpitude, or Oppression</i>	ib.
II.— <i>Contracts which are Void, but not Criminal</i>	33
PART. I.— <i>Void Insurances</i>	34
II.— <i>Wagers</i>	43
III.— <i>Annuities</i>	48
CHAP. V.— <i>Cases in which the Action is not maintainable</i>	55
SECTION I.— <i>Miscellaneous Cases</i>	56
II.— <i>Compromise</i>	59
CHAP. VI.— <i>The Effects of Judicial Proceedings</i>	62
VII.— <i>By what Persons the Action may be maintained</i>	70
VIII.— <i>Against what Persons the Action may be maintained</i>	72
IX.— <i>The Damages</i>	80

AN
E S S A Y
ON THE
LAW OF INSURANCE,

INTRODUCTION.

IN offering a summary view of the law concerning insurances, no plan can in general be more beneficial than to follow the guidance of Mr. Park. The distinctness of his arrangement, the accuracy of his statement, and the justness of his conclusions, have procured to his treatise a merited celebrity, and concur in recommending it to the attentive perusal of all who are desirous of attaining a comprehensive knowledge of the subject, and of examining the very admirable series of reasoning, by which, in the course of a few years, this branch of jurisprudence has been raised from a chaos of unconnected decisions, to a system of the most approved justice and regularity. The object of the following pages is principally to exhibit the conclusions which form the existing law, and the principles with which they are connected, without

Ev.

O

ON THE NATURE AND REQUISITES

entering into a minute examination of the cases and arguments by which those conclusions have been judicially established.

By the term *insurance*, marine insurances will be generally implied, and any observations which particularly apply to those of a different nature, will be stated separately.

That principle of integrity and good faith, which is the basis of every contract, and which is usually implied in every general observation, is peculiarly a leading feature in the law of insurance, and any violation of it is fatal to the interests of those in whom it is detected. The persons on whose behalf insurances are made, are also subject to several conditions, very necessary to be established for the general purposes of certainty and regularity, but of which an advantage is sometimes taken by the insurer, in a manner that indicates the disposition of defeating their obligation by every nicety of legal objection. Some modern instances of this conduct, have been animadverted upon in courts of justice with just severity.



CHAP. I.

On the nature and requisites of a Policy of Insurance.

THE particular necessity that an insurance (subject to certain exceptions) shall be upon a real in-

ness, will be specified in its proper place: at present it may be premised, that the subject under discussion, is a contract of indemnity for an actual loss in consideration of a stipulated premium. The contract being universally, though perhaps not necessarily in writing, is subject to the general rules of law respecting written contracts. In the application of these rules it has been held, that no alteration can be made in a policy after it is effected. The intention of the parties must be collected from the instrument itself, and not from any conversations respecting it. Where a mistake is manifest and apparent, it may be rectified by the interposition of a court of equity, but that mistake must be rendered evident in the strongest and most unsuspicious manner, every presumption being in favour of the real intention being properly expressed.—*Vid. Henkle v. R. E. Ass. 1 Vez. 317. Motteux, v. Lond. Ass. 1 Atk. 545.*

The general right of entering into any legal contract restrained by a statute which secures to the two companies of the London Assurance and Royal Exchange Assurance, the exclusive right of insuring by a common fund, and all other insurances in co-partnership are declared to be void, and all sums under written thereon, are to be forfeited, half to the king, and half to the informer.—6 Geo. I. c. 18. A sum of money was paid to government for the benefit of this monopoly, the professed purpose of which was the stability of the security.

All the decisions upon the construction of this statute, are of very modern date. The points which they have established are, that where a partnership is entered into in contravention of the prohibition that it contains, one of the partners has no claim upon the other for a proportion of the losses which he had paid.—*Mitchell v. Cockburn*, 2 H. B. 379. Where three persons were engaged as partners, and the policies were in the name of one of them, and another together with a partner of his own (to which partnership there is no legal objection) were the brokers, the assignees of the person whose name was used, were not allowed to recover from the brokers the premiums received.—*Booth v. Hodgson*, 6 T. R. 405. It had, previously to these cases, been held by Lord Kenyon at *nisi prius*, that an underwriter, who had paid a loss, could not recover from a broker the money which the broker had received from another person, who had agreed to take half the plaintiff's risk, his lordship saying, that a party could not appeal to a court of justice to enforce a contract, founded in a breach of the law. *Sullivan v. Greaves*, Park, 8. But it has been since ruled by the court of Common Pleas, that a broker to whom the underwriter had paid the loss on an illegal policy, could not resist paying it over to the assured, and they even refused to grant a rule to shew cause why there should not be a new trial. Mr. Justice Buller said, "Is the man who has paid over money to another's use, to dispute the

legality of the original consideration? Having once waved the illegality, the money can never come back to his hands again. Can the defendant then, in conscience, keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it, but the plaintiff?" Lord Chief Justice Eyre said, "The question is, whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot." *Tennant v. Elliot*, Bos. 3. This decision certainly cannot, in principle, be reconciled with that before Lord Kenyon; and it cannot require much argument to shew that it is more consonant to the substantial principles of justice, and so connected with them, that nothing but the most authoritative provisions of the law, should be sufficient to induce an opposite conclusion. The person who is interested in contesting the legality of a contract, waves the exception, and transmits the money which he has engaged to pay, and which he was under an honorary obligation to pay, by the hands of a third person, as he might have transmitted a mere donation; and the question is, whether a man, who is only the instrument of such transmission, shall be allowed to intercept such money in course, and appropriate it to himself? The statement of such a question would seem sufficient to decide it. Even the case of *Booth and Hodgson*, seems to be in some degree founded upon disputa-

ble reasoning, There were in that case, in truth, three contracts, or sets of contracts: 1st. The partnership for insurance, which was confessedly illegal. 2d. The contracts of insurance which, as between the plaintiff, the insurer, and the assured, were legal and obligatory, and in respect of which, there was no dispute; and 3d. The contract of service or commission between the insurer and the broker. When the broker, in pursuance of the last of these three contracts, had received money for the use of the insurer upon the second, it would have been very iniquitous to have retained that money upon the allegation, that the insurer had entered into the first contract respecting the subject matter with his partners, and which could not be enforced as between themselves, the insurer would singly have been liable to every loss, and would singly have had a right of action against the insured, for the premiums. No contribution could have been claimed on either side; then the broker must either retain the money himself, or he must pay it to the insurer, whose name was used, or to the insurer and his partners jointly. Against the first, there should be every leaning and presumption, as much as in the case last discussed; and this, whether there was a broker merely engaged as such, or two brokers in co-partnership; one of whom was a member of the illegal partnership of insurance. The legal prohibition seems to attach upon the third case, leaving the second, in which the benefit would accrue to the party who had subjected

himself to all the legal claims of the several persons assured. These suggestions, however, are by no means offered with the same degree of confidence as the objection to the broker being permitted to retain from one partner, what he had actually received in execution of the engagement of the other.

Where several persons mutually agreed to insure the vessels of each other, and there was a clause, that in case any of them should become insolvent, the others should be answerable for his proportion; this mutual security was held to constitute a partnership, and consequently to bring the agreement within the reach of the prohibition.—*Lees v. Smith*, 7 T. R. 338.

By the positive regulations of many foreign countries, the master and mariners are prohibited from making an insurance on their wages and perquisites, on the principle that such an indemnity might lessen their exertions for the safety of the ship; and this principle seems to have been tacitly, and without any express ordinance, engrafted in the English jurisprudence. There are cases in which it is taken for granted, that such is the law, though the precise question has never, so far as I am aware, been the subject of immediate discussion. Any specific property of the master or mariners, is equally insurable with that of any other person.

The usual subject of marine insurances, are the

ON THE NATURE AND REQUISITES

ship, the goods, and the freight. Bottomary and respondentia interests, may be also insured; but these interests must be particularly stated in the policy, and will not be covered by a general insurance on the ship or goods. It appeared in a case on the subject, that they were, in practice, regarded as a particular object of insurance, and had taken a particular denomination.—*Glover v. Black*, 3 Bur. 1934. 1 Bl. Rep. 405. A captain was allowed to recover, under a policy upon goods, money expended in the course of the voyage, upon which respondentia interest was charged, this appearing to be the constant mode of effecting such insurance.—*Gregory v. Christie, Park*, c. 1.

Policies of insurance are almost constantly effected, according to a common printed form; the particular objects of the immediate contract, are inserted in the blanks, and the written parts are considered as the real contract, in case of any variance from such as are printed. The old and inconvenient form used for this purpose, has been often the subject of observation, and it derives its efficacy from the established nature of the contract, rather than from an application of the common rules of construction to the particular expressions.

Mr. Park, in analysing the policy, considers it under the following divisions: 1st. The name of the person for whom the insurance is made. 2d. The names of the ship and master. 3d. Whether they are goods, ship, or merchandise, upon

Which the insurance is made. 4th. The name of the place where the goods are laden, and whither they are bound. 5th. The time when the risk begins, and when it ends. 6th. All the perils and risks which the insurer takes upon himself. 7th. The consideration or premium paid for the risk or hazard run. 8th. The month, day, and year, on which the policy is executed. 9th. The stamps required.

Without following him through all the particulars of this analysis, it will be sufficient for the purpose of the present general enquiry, to mention those which require distinct observation, as to their legal sufficiency.

It is provided by a particular act of parliament, that no policy should be made without first inserting the names or firm of the persons interested in the assurance, or of the consignees of the property to be insured, or of the persons residing in Great Britain, who receive the order for, and effect the policy, or who give the order or directions; the agents immediately employed to negotiate or effect the policy; and every policy made contrary to these directions, is void. 28 G. III. c. 56. Upon this act it has been held, that it is not necessary, when the policy is effected by an agent, to add the word *agent*, or any other description to his name, in the policy itself, and also that a policy effected by a broker, describing himself therein as agent, was sufficient.—Park 19. *De Vignior v. Swainson*, B. R. M. 39. G. III. *Bell v. Gibson*, Bos. 345.
Ev. P

Mr. Park seems to intimate a doubt upon the question, whether if the ship is navigated by a different master from the person mentioned in the policy, the policy would be void. According to the true intention of the parties, it appears to me that the name of the master is only a part of the description, to denote and indentify the subject of the contract, and not an essential stipulation, which must be literally complied with. And this opinion is fortified by the expression which he cites, *or whosoever else shall go for master*.—And in general, a mere variance of description is immaterial, if the object is, from other circumstances sufficiently ascertained. It has been decided, that a policy upon goods on board a ship or ships, is good, and that the insured have a right to apply it to whatever ship they think proper with the terms of it.—*Kewley v. Ryan*, 2 H. B. 338.

It is essentially necessary to specify upon what the insurance is made, whether upon the ship, goods, freight, &c. Whether the particulars of the goods should be specified or referred to by a general denomination, seems merely a question of discretion, in regard to the strictness or facility of proof; but it has been held in *Ross v. Thwaites*, Park, 21. that a general insurance upon goods, only extends to such as are merchandizable and a part of the cargo, and not on goods lashed on deck, the captain's clothes, and ship's provisions. The usage appearing to be to insure these articles specifically and upon a higher premium.

The risks mentioned in the policy, are perils of the seas, men of war, fire, pirates, rovers, thieves, perils, letters of mart and countermart, surprizals, takings at sea, arrests, restraints, and detainerments of all kings, princes, and people of whatever nation, condition, or quality, soever; barratry of the master and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the goods and merchandizes, or ship, or any part thereof. Mr. Park alludes to the question, whether the insurance extends to damage sustained by goods on board the ship, and not arising from external accidents? As this damage may be occasioned by bad stowage, or from their being exposed to wet, he concludes, and the reason of the thing seems to require, that the ship, and not the insurer, should be answerable. He also mentions the question, whether the insurance against perils from thieves extends to depredations committed on board? and cites the opinion of an eminent foreign jurist, that it does not.

The insurance of vessels *lost or not lost*, is peculiar to English policies; but I cannot subscribe to the opinion, that such a contract is peculiarly hazardous, or that there is greater actual risk in insuring upon a present unknown event, than on one which is merely prospective.

Amongst the several regulations introduced by parliament to alleviate the miseries of the slave-trade, there is a provision that no damage shall be

recovered on any loss by the mortality of slaves, by natural death or ill treatment, or by throwing overboard; or for any loss by the detainment of kings or other inhabitants of Africa, if occasioned through any aggression for the purpose of procuring slaves, and committed by the master, or any persons commanding any boat or party of men belonging to the ship, or any persons acting under the authority of such master or commander. 39 Geo. III. c. 80. It has been decided, that this clause extends to a loss of slaves starved by an inevitable failure of provisions.—*Tatham v. Hodson*, 6 T. R. 656.



CHAP. II.

Of the construction of Policies of Insurance.

IN adverting to the cases which have arisen on the construction of policies of insurance, it is evident that there is no instrument in which the effect of general usage, and the nature and purpose of the transaction, become so frequently a material object of consideration. It has been held, that a general policy, from one place to another, attached upon every loss which might arise until the vessel was discharged of her voyage by being unloaded, and was not satisfied by merely arriving at the port of destination.—*Aston. Skin.* 243. But under the common provision, that the insurance on the ship

shall continue until she shall have moored twenty-four hours in good safety, the loss must actually happen before those twenty-four hours have elapsed; and any subsequent loss, although occasioned by anterior circumstances (as it has been determined, *Lockyer v. Offley*, 1 T. R. 252. with respect to a seizure occasioned by previous barratry of the master) will not entitle the assured to recover. In the case which produced that determination, a former judgment of Lord Mansfield, that upon an insurance for a given space of time, a loss of the vessel after that time, in consequence of having received her death wound before, was not protected, was properly cited as containing an analogy of principle. But when within the twenty-four hours an order arrived to go back and perform quarantine, upon which the men deserted, and a petition was presented to be excused from the quarantine, which, after several days consideration, was rejected: it was held, that a subsequent accident during the performance of quarantine, was within the policy, and that a vessel could not be deemed to be at her moorings *in good safety*, unless there was an opportunity of unloading and discharging.—*Staples v. Eames*, 2 Str. 1243.

Upon a general insurance of freight from a port where the vessel is lying, the right only attaches from some of the goods being taken on board: and before that is done, no accident which prevents the sailing of the vessel, will entitle the insured to recover the value of the freight which he would

have earned.—*Touge v. Watts*, 2 Str. 1251. If it is an open policy, the insurance only attaches upon the freight of the goods which are actually taken on board; but if it is a valued policy, by taking any part on board, the right attaches in respect to the whole amount. *Montgomery v. Eggington*, 3 T. R. 362. If the vessel is to sail from one port to another, and there take the goods on freight, the risk commences from the first sailing of the vessel.—*Thomson v. Taylor*, 6 T. R. 471.

When a vessel is insured *at and from* a place, the insurance continues as long as the voyage insured is actually in contemplation; but if that is abandoned it does not extend to any subsequent time, during which the vessel may be kept at such place on other accounts.—*Selwin*, 2 Atk. 359. It seems to be the established usage of merchants, supported by legal decisions, that an insurance upon goods from London to Jamaica, (or, I conceive, any other island or country) ceases upon the arrival at the first port in the island to which it is destined, or (according to the agreement) within twenty-four hours after, and does not continue during the passage from one port to another. *Camden v. Cowley*, 1 Bl. 417—*Barafs v. Lond. Ass. Park*, 39.—*Leigh v. Mather*, *id. ibid.* and consequently that the homeward risk, at and from the island, commences from such first arrival, but the outward policy upon goods continues until they are actually landed.—*Tiernay v. Etherington*, *cit.* 1 Bur. 348.

Goods were insured from Malaga to Gibraltar and from Gibraltar to England, with liberty to unship at Gibraltar, and load on board other ships; they were put on board a store ship at Gibraltar.

—*Tiernay v. Etherington*, cited, 1 Bur. 348.

The sails of the vessel at Canton, were put upon a bank-saul to be aired, and there accidentally destroyed by fire.—*Pelly v. R. E. Afs.* 1 Bur. 348.

Goods insured on a voyage to Labrador, and until there safely landed, were taken by a privateer after there had been sufficient time to land them, the crew being engaged in fishing, which is the principal object of the voyage.—*Noble v. Kenoway*,

Doug. 492. In all those cases it appeared, that what had been done was in the ordinary and usual course, and the insurers were determined to be liable.

It was held, that the construction of the policies should be according to the course of trade in the respective places, and under such methods as are usual and proper; that a certain, necessary, ordinary course of the voyage could not but be in the direct and immediate contemplation of the underwriter, at the time when he engaged; that describing the voyage has an express reference to the usual manner of making it, as much as if every circumstance was mentioned. Every underwriter is presumed to be acquainted with the practice of the trade that he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself of it; and the mode of conducting a particular branch of trade at one place, may be proper evidence of the propriety of

similar conduct at another place, under the same circumstances.—The same principles have been applied more strongly with regard to East India voyages. The charter parties of the East India company, always contain a liberty to prolong the ship's stay for a year; and it is very common by a new agreement, to detain her for a year longer, which is more beneficial to the owners. The insurances upon these voyages, are usually with liberty to touch, stay, and trade, at any place or places whatever, (the word *trade* not being used in the general permission of other policies.) This was partly relied upon in the earlier cases on the subject, but it was afterwards held, that the want of the word *trade* did not produce any difference.—*Salvador v. Hopkins*, 3 Bur. 1707.—*Gregory v. Christie*, Park, 49.—*Farquarson v. Hunter*, id. 50. The usage of detaining the ship for the intermediate voyage being frequent and notorious, is necessarily referred to by the general terms of the policy, and the country voyages are presumed to be included; but the operation of the policy may be restrained either by positive expressions or reasonable implication, as from a permission to stay and touch *at any place in the outward or homeward voyage*, which qualify and restrain the general words to such places as are in the usual course of the voyage, to and from the places mentioned in the policy.—*Lavabre v. Wilson*, Doug. 284.

An insurance can only be applied to the losses

which affect the property insured, and not to any collateral and incidental expences, which may be occasioned in respect of it; such as extraordinary wages for seamen, or an extraordinary consumption of provisions, in the insurance of a ship; *Fletcher v. Poole*, Park, 53. freight paid *pro rata itineris*, on an insurance of goods.—*Baillie v. Mondigliani*, id. ibid.—*Eden v. Poole*, id. 54.—*Robertson v. Ewer*, 1 T. R. 127. But it has been held, that a loss of provisions by fire was covered by the insurance of the ship with her furniture, that being the usage of merchants upon the subject.—*Brough v. Whitmore*, 4 T. R. 206. Also, the policy can only be applied to a loss which is directly occasioned by the perils enumerated, and not for any remote injuries which they may have eventually occasioned. Before the insurances on the slave trade were restricted, an insurance against the mortality of slaves by mutiny was held not to include the loss of those who, having failed in a mutinous attempt in despair, chose a mode of death by suicide, or died through despondency.—*Jones v. Schmoll*, 1 T. R. 130:

In respect to the length of time mentioned in a policy, a permission to cruise for six weeks, was held to mean a congregate denomination of time, and not a liberty to break the continuity of the voyage by several unconnected acts of cruising, in which a greater time than six weeks was not occupied in the whole, there being no established usage in favour of such a desultory cruising.—*Syers v. Bridge*, Doug. 509.

Ev.

Q

CHAP. III.

Of Losses by Perils of the Sea.

THE only kinds of losses to which I think it necessary particularly to refer, are those which arise from the perils of the seas, from captures, from detentions by kings, princes, and people, and from barratry. It has been held, that under an insurance against the perils of the sea, the assured was not entitled to recover, on account of a failure of provisions, by the inevitable prolongation of the voyage, which rendered it necessary to throw overboard some of the slaves, or in consequence of which, the slaves were starved to death.—*Gregson v. Gilbert, Park, 65.*—*Tatham v. Hodgson, 6 T. R. 656.* Also, where a ship was destroyed by a species of worms, which infest the rivers of Africa. Lord Kenyon decided, according to what appeared to be the usage of merchants, that such a loss was not protected by the policy.—*Bold v. Parr, Park, 63.* Where a vessel has not been heard of for an unusual time, it induces a presumption of her being lost by the perils of the seas. What time shall be sufficient for this purpose, is a question of fact, to be decided by a jury under all the circumstances. In France and Spain there are positive ordinances upon the subject.



CHAP. IV.

Of Losses by Capture.

THE doctrine concerning losses by capture, as between the insurer and the insured, in a contract of indemnity upon a real interest, has been reduced to very distinct principles, in cases which will be mentioned under the article of abandonment. Immediately upon the vessel being captured, the right of the insured attaches without regard to the general question, which has been much agitated by the writers upon the law of nations, at what period a change of property by capture takes place. They may demand the amount of the insurance, and the insurer will be entitled to any benefit from a subsequent recovery. Lord Mansfield observed in one of the cases just mentioned, *Goss v. Withers*, 2 Bur. 694, that as wager policies were expressly prohibited, that question can only be material between the owner and a neutral person, who has bought the capture from the enemy, or between the owner and recaptor. But this observation is not perfectly correct; for insurances without interest, may be made upon foreign property; and there are other excepted cases, in regard to which the general question may still arise.

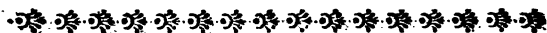
Several cases, which were all upon wager-poli-

cies, arose previous to the statute prohibiting such policies upon British property: the result of those cases seems to be, that if the property was actually taken during the voyage or period insured, by enemies or pirates, the policy attached as upon a total loss, though there was a subsequent recapture; but if at the time of the capture there was a cessation of hostilities, though no proclamation of peace, it would not be deemed a capture by enemies; and that in such case, any detention by the government of a country, only amounted to a partial loss, which, upon wagering policies, was not sufficient to entitle the assured to recover.

It has been held, that where, after a capture had been made, which was not agreeable to the laws of nations, and considerable expence had been incurred in litigation, the owners made a fair compromise, as men acting for themselves and upon a reasonable footing; the money paid in pursuance of such compromise, was chargeable to the underwriters.—*Berens v. Rucker*, 1 Bl. 313.

Two acts of parliament have prohibited the ransom of property captured from British subjects. A vessel being captured by the French, and carried into Norway, was, after a condemnation there by a tribunal established by the authority of the French government, but which court and its sentence were agreed to be of no authority, sold by auction, and purchased by the original owners. This purchase was decided to be a ransom within the scope of the prohibition, and therefore not a

charge which could be thrown upon the underwriters in adjusting a partial loss. It was also decided, that the property having, under these circumstances, again become the property of the assured; and there having been no abandonment, the loss could not be considered as total.—*Havelock v. Rockwood*, 8 T. R. 268.



CHAP. V.

Of Detention by Princes.

WITH respect to restraints and detainments by princes, &c. it is held, that the detention of a neutral ship, for refusing to be searched, was within the risk insured; for that such a ship is not obliged to stop to be searched, and the searcher stops it at his peril.—*Salouci v. Johnson*, Park, 79; but this doctrine is impeached by a very important judgment in the court of Admiralty, at present under the revision of the Privy Council, in the case of a Swedish convoy, which will be mentioned more particularly hereafter. No detention for navigating against the laws of a country, by which the property is detained, can give a claim for indemnity upon this part of the policy. Any barratry incurred by the master is a distinct consideration. An opinion was expressed by Lord Chief Justice Holt that the insurance against detention of princes, extends to a detention by the government to which

the vessel belongs, but the point was not judicially decided.—*Green v. Young* 2 Ld. Raym. 840—2 Salk, 444. Mr. Park truly observes, that although till lately there was no case in which this point was expressly considered; yet it seems to be taken as settled in many cases which have come before the court. In a late case there was an express determination according to that opinion, in respect of a foreign vessel; but the judges declined giving their opinion upon the effect of an embargo laid by the government of this country in respect of a ship insured here. At the same time it must be observed, that the reasoning pursued is irreconcilable with any distinction upon that ground. Lord Kenyon said, no common man, reading the words of the policy, could entertain a doubt upon the question; and it is by artificial reasoning only, collected by great reading from foreign authors, that the claim can be repelled. But in truth, when examined, the research turns out all one way, and is all in favour of the plaintiff; and when to the current of authorities we add the words of the policy itself, it is perfectly clear.—*Rotch v. Edie*, 6 T. R. 413. The question occurred in a subsequent case, brought before the King's Bench for argument which went off on a collateral ground.

A few years ago it was contended; that the general expression of detainments of all kings, princes, and *people*, of what nature, kind, or quality soever, included the forcible act of a riotous

mob, for that the term *people*, was co-extensive with *persons*; but it was properly decided, that the people intended must, from the context, be understood to mean those who were invested with the government of the country.—Nesbitt v. Lushington, 4 T. R. 783. In order to recover on a loss by detention, there must be an abandonment within a reasonable time. The reasonableness of time is a question of fact for the decision of a jury.



CHAP. VI.

Of Barratry.

BARRATRY is by some modern determinations ascertained to mean the fraudulent conduct of the master or mariners against the owner of the vessel. Lord Mansfield has truly observed, that it is extraordinary that the word should have crept into insurances, and still more so that it should have continued in them so long, for the underwriter insures the conduct of the captain, whom he does not appoint, and cannot dismiss, to the owner who can do either.

No want of skill or judgment, without a fraudulent intention, can amount to barratry.—Phynn v. R. E. Ass. 505. Neither can any combination between the owners and master of the vessel, to de-

fraud the shipper of the goods; *Nutt v. Bourdieu*, 1 T. R. 323. But a person to whom a vessel is let on freight, is, for this purpose, considered as owner, and barratry may be committed by an act done to his prejudice with the concurrence of those to whom the general property belongs.—*Valleio v. Wheeler*, Cowp. 143. If the same person is owner and master, it is evident that no act of his own can constitute barratry.—*Lewin v. Suasso*, Park, 94. And the court of Chancery has granted an injunction upon an action against the insurer, on account of a loss by barratry, brought by a mortgagee of a vessel where the characters of owner and master were united in the mortgager, who was, notwithstanding the mortgage, considered as effective owner.

It is not necessary that the act of barratry should be the immediate occasion of the loss. If the voyage has been altered by the iniquitous conduct of the master, any subsequent loss, of whatever nature, gives a right to recover on the policy. If it were otherwise, the deviation would prevent the liability of the insurers.

It is unnecessary to enumerate the various modes in which barratry may be committed, whether by running away with the vessel, smuggling, using a letter of marque in the chase of a vessel, contrary to instructions*, or any other act within

* *Moss v. Byrom*, 6 T. R. 579. In that case it was said, that though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his

the general definition of the term, which comprehends every species of fraud, knavery, or criminal conduct, in the master or mariners, by which the owners or freighters are injured. But though there can be no barratry where the same person is master and owner, if an act amounts in its nature to barratry, the owner of *goods* insured is not bound to prove that the master is not the owner of the ship. That fact, if true, must be proved by the insurer in his own discharge.—*Ro's v. Hunter*, 4 T. R. 33*.

duty to them, it was barratry. In a subsequent case this expression was relied upon to shew that fraud was not an essential ingredient in the definition of barratry: but the same judges disavowed such an application of their former decision.—*Va. Phynn v. R. E. A.* 7 T.R. 505.

* In a case before the supreme court of Pennsylvania, it appeared that Keeler, the captain of a vessel went out of the course of his voyage in quest of another ship, (the *Fly*,) that had been run away with by the sailors, for which he was to receive 100*l.* for the benefit of his owners and himself. The court, upon reviewing the authorities of the English law, (which, in the courts of America, are always quoted with respect) were of opinion, that this did not amount to barratry, but was merely a deviation. The following is an extract from the judgment of Bradford, J.—The master's intention was relied on by both parties. It was admitted, that if the master had deviated with a view to his private advantage alone, and without intending any benefit to his owners, it would have been barratry. The law is so, and the reason is plain: such conduct imports fraud on the face of it. It is a cheat upon the owners, and secretly putting in his pocket what belongs to them. On the other hand it was agreed, that if it had been for the exclusive benefit of his owners, it would not have been barratry: and why not? Because it is impossible to impute fraud to such

Ed.

R.

disinterested conduct. The case before us is a middle case between the two I have mentioned. The master did intend the profit he might have gained, should be for the benefit of his owners and himself; and, while the defendants urge that his attention to his owner's benefit renders it a mere deviation, the plaintiffs contend, that the private views poison the whole transaction, and make it barratry. Inconveniences appear to result from either construction, and I think it would be mischievous to give the captain's conduct, from this circumstance alone, a definite name. It does not of itself sufficiently import either fraud or fairness, to acquit or condemn the transaction. Cases may be put, where an intention to his own interest may not be inconsistent with the general purity of the master's views. Such was the case in *Elton & Brogden*. On the other hand, the master may unite a small interest of his owners, with a greater one of his own; yet we may discover a dishonest heart, regardless of their essential interests. In every case therefore of this kind, we must weigh every circumstance, and form our judgment from the impression of fraud, or fairness, which the whole transaction makes on our minds.

Taking into view the whole conduct of Keeler, I cannot discover any fraud or criminal conduct. Here was an act of piracy committed in open day: the pursuit of the *Fly* was, in itself, a meritorious action; and if Keeler had been the owner of the *America*, he would have been applauded for it. The whole mercantile world seems interested in the suppression of such villainy. He is solicited to employ his vessel on the occasion; he stipulates for a compensation and though he expected to receive a part of it himself, yet that must have depended on the pleasure of his owners. It would have been their money, earned by their ship; yet the captain might honestly expect, that they would approve his conduct and reward his exertions. It was a sudden thing: we cannot say that he knew of this insurance or that he was aware of the consequences of his deviation. Here are no marks of knavery, or even of a disregard to his owners' interests: It was an imprudence; and he is answerable for it to his owners; but the insurers are discharged.—*Hood's Executors v. Fry*, 2 Dallas's Reports, 137.



CHAP. VII.

Of Partial Losses and Adjustment.

THE property which is insured may be wholly lost, or a part of it may be lost, the remainder continuing; or it may be deteriorated in value, or expence may be incurred in respect of it. The losses in all these cases, except the first, are referred to in the usual memorandum in the policies as *average* losses; but as the term *average* is used for other purposes and in different significations, Mr. Park, to avoid ambiguity, has substituted that of *partial* losses. When some goods are thrown overboard for the preservation of the ship, and the remainder of the goods, the general contribution to indemnify the owner of the goods which are sacrificed, is called a general average. The subject to be at present considered, according to Mr. Park's arrangement, is the partial losses that have been already mentioned. The memorandum commonly inserted in the margin of policies, provides against paying any thing in respect of these partial losses, unless they amount to 3l. per cent. and upon certain enumerated goods, nothing is to be paid for partial losses under five per cent. Upon a partial loss, the underwriter must contribute such a proportion to the whole amount of his subscription, as the loss sustained bears to the whole value of the commodity insured. If it

is an open policy, the goods insured are either in case of a total or partial loss, estimated at their prime cost: if it is a valued policy, the valuation comes in lieu of the prime cost. In case therefore the whole is lost, the whole original price, or the whole estimated value, must be paid. In case the loss is partial, so much of the original or valued price must be paid, as the proportion in which the property is lost or deteriorated, bears to the whole value of the property insured. In estimating this proportion, if a given part is wholly lost, nothing can be more obvious than the liability to contribute an equal part of the insured value. But if part of the property suffers a deterioration in value, and the whole is sold at a given market, whether the rate of the market is high or low, the difference in price between the one part and the other, will equally regulate the proportion between the injury sustained and the value insured. If ten hogheads are valued at 500*l.* and five of them were injured, and upon their arrival at the port of destination, the other five sell for a thousand or five hundred pounds, and these at five hundred or two hundred and fifty, the loss is a fourth of the whole value of the article, and the liability is for a fourth of the insured value, or 125*l.* And this rule is not to be varied on the ground that the detriment renders an immediate sale necessary, and that a higher price would be obtained if the goods could have been kept until a future period, when the market is more favourable; for the object of the insurance is not the fluc-

situation of the markets, but the safe arrival of the goods; and the rule of computation is the comparative detriment in value at the time of arrival. These are principles deduced from a case, *Lewis v. Ruckler*, 2 Bur. 1167, in which Lord Mansfield considered the subject with peculiar attention, and which has ever since been regarded as affording the proper standard. If several goods of different natures, are insured at an aggregate value, and some of them are lost, the prime cost of the whole must be taken; and the proportion paid for those which were lost, must regulate the proportion of the stipulated value. If the goods arrive with a detriment in value, affecting the whole, the rate which they would have produced, if no such detriment had been received, must be estimated as accurately as the circumstances will admit, and which may be attended with greater difficulty or facility as the commodities are of an unusual or frequent description, and the deduction from the price which would not have been produced, must determine the proportion of the original value which is to be paid.

On account of the perishable nature of certain commodities, and the difficulty of ascertaining whether the loss which they sustained is occasioned by the perils insured against, or their own insufficiency, it is provided in the policies of private underwriters, that they shall be free from average unless general, *or the ship is stranded**. The two

* Corn, fish, salt, fruit, flour, and seed, warranted free from

companies, in consequence of a small partial loss having been recovered from the London Assurance Company, upon a vessel that had been stranded, have, for several years, omitted the latter alternative, and do not in any case, subject themselves to a particular average upon these commodities. In the exposition of this clause it has been held, that if the commodity specifically remains, no injury which it may receive, although the value is entirely annihilated, can entitle the assured to recover. A cargo of fish was rendered of no value in consequence of sea damage. It was said by Lord Mansfield, "The underwriter engages for a total loss; a total loss is the absolute destruction of it by the wreck of the ship; the fish may all come to port, though from the nature of the commodity it may be stinking, still, if the commodity specifically remains, the underwriter is discharged."—*Cocking v. Frazer*, Park, 114.—*Vi. Willon v. Smith*, 3 Bur. 1550.—*M'Andrews v. Vaughan*, Park, 115.

Upon the effect of the exception in private policies respecting the stranding of the ship, a very important decision has recently taken place in a case, which, as Mr. Park observes, underwent as much discussion as any case that ever arose at Guildhall. It was ruled, that a ship is stranded by striking upon any part of the substance covered

average, unless general, or the ship is stranded. Corn has been held to include pease and beans. Salt does not include saltpetre.

by water; though immediately got off; and that if, in fact, there has been any stranding, the insurers are liable for a partial loss, as in case of any other commodities, although it is clearly ascertained that the injury arose from other perils, perfectly distinct from the stranding. The literal grammatical meaning of the clause was satisfied by this construction, and the court were of opinion, that it could not be restrained to damage *occasioned by stranding*. *Burnet v. Kensington*, 7 T. R. 210.

There had previously been cases in which a contrary opinion appears to have been entertained, but the opinion in those cases was collateral to the immediate questions in dispute.

If an average loss is adjusted between the insured and the underwriters, it supercedes the necessity of entering into any proof upon the subject. That any fraud will invalidate such an adjustment is evident; and I think that if any mistake can be distinctly shewn, the party would be relieved. Lord Chief Justice Lee, who was peculiarly cautious against making incidental observations, not operating upon, or connected with the ground of his judicial opinion, compared it to a case of a note of hand, which is clearly subject to the observation just suggested. Any stated and balanced account is presumptive evidence of the liquidated balance being correct, and does not require to be supported by other evidence, but it may be repelled by positive testimony of any material error. This principle appears to have been adopted in a

case, *Rodgers v. Shayter*, 118, stated by Mr. Park, where the adjustment was held to be *prima facie* evidence against the insurer : but it afterwards appearing that there was a misconception, a verdict was given in his favour. In a subsequent case, *De Garron v. Galbraeth*, Park, 118, where the same witness who proved the adjustment, proved that soon after it took place, doubts arose in the minds of the underwriters as to the honesty of the transaction, and that they called for further proof ; it was held that the assured was bound to give additional evidence ; that the mere objections of the insurers, who by their adjustment had rendered themselves primarily liable, should be allowed to defeat or diminish the effect of that adjustment, seems, in some degree, repugnant to the general rule, that no man can, by subsequent conduct, qualify his own acts. It was competent to them to defeat the adjustment by actual proof, but the effect of an adjustment would be very uncertain, if the party, by his own refusal, could defeat his own deliberate undertaking. Whether the matter was proved by the same, or a different witness, must be perfectly immaterial as a question of law, the facts being in themselves separate and distinct ; and it would be extremely difficult to draw any line between a recent objection, and an objection on the day preceding the trial. At all events it might be sufficient to leave the notice of such dissatisfaction, and the omission of giving further evidence to the jury as a matter of suspicion.

Upon a valued policy, *interest* or *no interest*, upon property excepted in the act against wagering policies, an adjustment was made as upon a total loss, and the subscription paid. Afterwards the property (being bullion) was recovered unimpaired, and it was decided, that the underwriter could not open the adjustment, and contest the valuation, but must only be placed in the situation of the assured respecting the property recovered.—*Da Costa v. Firth*, 4 Bur. 1966. In that case, the money paid by the underwriter was certainly due at the time, and the right of the parties was not varied by the subsequent event. But if it had appeared that there had been such a disproportion between the estimated and the real value of property within the act, as manifested the valuation to have been merely a colourable wager, the justice of the case might have been extremely different.



CHAP. VIII.

Of general Average and Salvage.

I DO not intend to enter at present into a minute examination respecting general average or salvage, but shall merely state the nature of them, and observe, that whatever is paid on these accounts is a loss for which the underwriters are answerable.

“ Whatever the master of a ship in distress, with

the advice of his officers and sailors, deliberately resolves to do, for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard to lighten his vessel, which is what is meant by jettisons or jetson, is in all places permitted to be brought into a general or gross average, in which all who are concerned in the ship, freight, or cargo, are to bear an equal or proportionable part of the loss of what was so sacrificed for the common welfare.—Magens, 55 Park, 121.

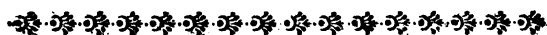
Upon this subject I shall probably, in another essay, have occasion to dwell at considerable length.

Salvage (as connected with the law of insurance) is an allowance for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies.

The proper allowance for salvage from natural perils, must vary according to the nature of every different case, and the circumstances of value, hazard, and labour, which it involves. The statutes upon the subject have pointed out a summary jurisdiction for the purpose of fixing this allowance; and it is also a matter within the jurisdiction of the court of Admiralty.

In respect of re-captures from the enemy, the statute 33 Geo. III. c. 66, has provided, that in all cases the rate shall be one-eighth, if the re-capture

has been made by any of his Majesty's ships, and one-sixth, if made by a privateer or other ship.



CHAP. IX.

Of Abandonment.

WE now proceed to the subject of abandonment, which occupies a very considerable portion of the treatise of Mr. Park.

If the property insured is totally destroyed, of course no question upon this subject can arise; for the whole amount of the insurance must be paid, and there is nothing upon which an abandonment can attach; but if the injury sustained is of such a nature as wholly to defeat the voyage, the assured may claim a satisfaction to the extent of the insurance for the entire property, abandoning all his right to the insurer; it being at all times in the election of the assured not to make such an abandonment, but claim a compensation for the loss which is actually sustained, (the case of detention of princes, &c. excepted.)

A few cases respecting this subject, have furnished matter for some of the most able and perspicuous reasoning, which the pages of jurisprudence can exhibit. In another work, now in the press*, and which will shortly be submitted to the public, the

* A general View of the Decisions of Lord Mansfield.

view of that reasoning was peculiarly adapted to the general design ; but the conclusions to which it led having acquired the most indisputable authority, nothing more will be necessary here than an accurate statement of the result, by which the subject has been reduced to a very few distinct and obvious propositions.

The basis of all the reasoning upon this part of the system, is the nature of a policy of insurance, as a contract of full, but mere indemnity against the perils to which it is referred. It is an insurance upon the ship (or goods) for the voyage. If either the ship (or goods) or voyage be lost, that may be treated as a total loss ; but no partial injury which does not defeat the voyage insured, can, by abandonment, be converted into a total loss. If a vessel, having been captured and recaptured, or having sustained any injury by the perils of the seas, is brought to a port, but in such a damaged state, or subject to such heavy charges that the voyage is defeated, or the captain, fairly exercising his judgment on behalf of all persons who may be concerned, disposes of the ship or cargo, the assured may disentangle himself from unprofitable trouble and further expence, by abandoning the property to the insurer, and leaving him to save or recover what he can.—*Goss v. Withers*, 2 Bur. 683.—*Milles v. Fletcher*, Doug. 219.—*Manning v. Newnham*, Park, 168. But if the same account brings intelligence of the ship having been captured and recaptured, and it appears that no other loss

has been sustained than a short temporary detention, and a charge for salvage and expences which the insurer is willing to pay, or (as it seems) it after the intelligence of the capture, and before the offer to abandon, there is intelligence of such a recapture as is consistent with the prosecution of the voyage, the assured cannot throw the property upon the underwriter, and demand a reparation for a loss as total, which is ascertained to be only partial; and for attempting to do which, there can only be two reasons; either that the property has been overvalued, or that the market has fallen below the original price. The insurer has no concern with the estate of the markets, and an excessive valuation is contrary to the spirit of insurance as a mere contract of indemnity.—*Hamilton v. Mendes*, 2 Bur. 1198. 1 Bl. 276.

At the time when the offer to abandon is made, the voyage must appear to be defeated. But after such an offer is made, and there is an adjustment and payment as upon a total loss, a subsequent recovery, consistent with the prosecution of the voyage, will not annul the adjustment which has taken place.—*Da Costa v. Firth*, 4 Bur. 1966. And the fair conclusion seems to be, that the mere offer to abandon, whilst the loss is total, is sufficient, notwithstanding such a subsequent recovery.

If the vessel has arrived at the port of destination, having received an injury to ever so great an extent, the vessel remaining, and the voyage being performed, the loss cannot by any abandon-

ment, be rendered total. That was decided in a case which gave Mr. Justice Buller an opportunity of stating one of the propositions already extracted, *that the insurance is upon the ship for the voyage.*—*Cazalet v. St. Barbe*, 1 T. R. 187.

An abandonment must be made in the first instance, and notice must be given within a reasonable time after intelligence is received; but there is no precise period limited for the purpose. It is therefore principally a question of fact. It may be suggested as a fair ground of consideration, whether any delay was merely occasioned by a wish to be accurately informed of the nature of the loss, or of the extent of intelligence, concerning it; or whether there was an intention to speculate upon the benefit of a future recovery; for when such an intention can be sufficiently established, the right of abandoning is evidently waved. According to the observation of Lord Kenyon, "The assured must make his election speedily, whether he will abandon or not, and put the underwriter in a situation to do all that is necessary for the preservation of his property, whether sold or unsold; he cannot lie by, and treat the loss as an average loss and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them."—*Allwood v. Henckell, Park*, 172,

If the assured, upon offering to abandon, is dissuaded by the underwriters, they are liable to all

Subsequent damage, though it should amount to the whole sum insured, or, as I conceive, exceed it.—
Da Costa v. Newnham, 2 T. R. 407.



CHAP. X.

Of Fraud.

THE preceding part of this essay has been occupied in examining the circumstances under which the claim to indemnity upon a policy of insurance arises; we now proceed to the cases in which that claim is defeated, whether by invalidating the contract at its commencement, or in consequence of subsequent events.

Fraud, which vitiates every contract, is eminently fatal to policies of insurance, the obligations in respect to which, depend upon the broadest principles of integrity and good faith.

The cases upon the subject have been divided into three classes: 1. The allegation of circumstances or facts which are known to be false. 2. The suppression of circumstances known to exist, and which, if disclosed to the underwriter, would either prevent him from undertaking the risk at all, or would entitle him to demand a larger premium. 3. Misrepresentation, though by mistake. As the subjects are distinctly understood, it may not be material very minutely to discuss the strict pro-

- priety with which a term is applied; but as *fraud* generally imports an intentional wrong, the third division is rather referable to the exception of material error, which is regarded by all writers upon the law of contracts as an inherent defect, however unconnected with that degree of moral guilt, which the word *fraud* naturally implies.

The position that the fraudulent allegation of circumstances known to be false, vitiates the contract, is too obvious to require particular illustration.

Upon the suppression of circumstances, several cases have arisen, and it is agreed, that the insured must communicate every information which he has received material to the risk intended to be run. An account that "a ship described like that insured had been taken," *Da Costa v. Scandret*, 2 Wms. 170, that the captain had told another person, that the ship insured was leaky, and that next day the person giving the information had a hard gale.—*Seaman v. Fonereau*, 2 Str. 1183. The fact that a vessel insured at and from Genoa had sailed from Leghorn with perishable commodities and put into Genoa for want of conveyance and had lain there for five months.—*Hodgson v. Richardson*, 1 Bl. 463. The account of the sailing on a particular day, *Ratliffe v. Schoolbread*, Park, 181, are circumstances of which the suppression has been decided to be fatal. But an underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew, what

way soever he came to the knowledge. The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed, and understood to be run by the express terms of the policy. He needs not be told general topics of speculation; as for instance, the underwriter is bound to know every case which may occasion natural perils, as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, and earthquakes. He is bound to know every cause which may occasion political perils from the rupture of states, from war, and the various operations of war. He is bound to know the probability of safety from the continuance and return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength. If an underwriter insure private ships of war from ports to ports, and places to places any where, he needs not be told the secret enterprizes upon which they are destined. If he insure for three years, he need not be told any circumstance to shew that the risk may be over in two. If he insure a voyage, with liberty of deviation, he needs not be told what tends to shew there will be no deviation. The rule is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of and has no reason to suspect.—*Carter v. Boehm*, 3 Bur. 1905. These were a part of the observations of Lord Mans-

Ev.

T

field with respect to an insurance upon Fort Matherborough, in the East Indies, in behalf of the governor. The objections which were made and over-ruled were, that there was no disclosure of the condition of the place; that there was no disclosure of a letter, stating an apprehension that the French, not being in a condition to relieve their friends upon the coast, were likely to make an attack upon that settlement rather than to remain idle. That another letter was not disclosed, from which it was inferred, that the French had a design to take the place the year before. Lord Mansfield said, that the underwriter took the knowledge of the state of the fort upon himself, taking it for granted, that it was in the condition in which it ought to be, as in fact it was. The other points merely related to general speculation, which it is not necessary to communicate.

A Portuguese vessel was condemned in France for having on board an English supercargo; and it was contended that it should have been disclosed that such a supercargo was on board; but the court of King's Bench were of opinion that this was not such a fraudulent concealment as would vitiate the policy, and took notice of the condemnation being founded upon an arbitrary and oppressive rule, contrary to the law of nations.—*Mayne v. Waller*, Park, 195.

No distinction has been made between the concealment of material circumstances through neglect or through an intention to deceive. In fact,

It would be next to impossible to distinguish by evidence, between the one case and the other: the material facts being known, and not communicated, is a sufficient objection, but that objection would be nugatory if it could be obviated by suggesting inadvertence.

The grand difference between a representation and warranty, seems to be that the one induces an error in regard to the subject of the contract, and the other is an express term and stipulation of the contract itself. A representation therefore must be material in its nature before the falsehood of it can be urged as the foundation of an error which destroys and vitiates the contract. If the instructions for a policy state that a vessel mounts twelve guns and twenty men, and she sails with fewer men and guns, but the force is rendered equal or superior by the number of boys and swivels, it is sufficient.—*Dawson v. Watson*, Cowp. 785. If a representation is made of the course intended to be pursued, and another is adopted within the terms of the policy, provided the real intention at the time of making the representation was as stated, and the variance does not tend to increase the risk, the insurance is good.—*Bize v. Fletcher*, Doug. 284. But if a material fact is positively stated, although in consequence of a fair but erroneous inference from intelligence received, the policy is void. Such is a declaration that a vessel was safe at a particular place on a given day, having in fact been lost the day preceding. The information

which was received, should have been communicated, leaving the inference to the insured—*M^r Dowall v. Frazer*, Doug. 247. Stating that a vessel was *expected* to sail from the coast of Africa, at a particular time, is not material, although the vessel may in fact have sailed much earlier.—*Barber v. Fletcher*, Doug. 292. It must be understood that such an expectation was fairly entertained.

A representation to the first underwriter extends to others as to matters of intelligence, such as the safety of a ship, but not to a collateral agreement as to the number of men and guns intended to be taken.

The knowledge of the agent who procures the insurance is equivalent to the knowledge of the principal. A case before the House of Lords may seem to carry the doctrine rather further; but the circumstances of that case may import a communication to the principal, if not in words, at least by very intelligible signs.—*Stewart v. Dunlop, Park*, 209.

A person who sold a cargo of corn, sent intelligence of its sailing to the correspondent of the purchaser, that he might insure, and had an opportunity of sending by the same post intelligence of the loss, and his omitting to do so was held to vitiate the insurance.—*Fitzherbert v. Mather*, 1 T. R. 12.

In regard to all the cases of fraud or misrepresentation, which have been mentioned, it is immaterial whether the loss was actually connected with

the false suggestion or fraudulent concealment. The effect of the objection is to annul the policy from its inception, and not merely to furnish a particular exception against any peculiar species of loss which may happen to arise.

The general practice is to return the premium, or pay it into court, in resisting an action upon an insurance under the imputation of fraud, or any other defect which tends to shew that no valid contract ever existed. Lord Mansfield, in one case in which the fraud was extremely gross, held that the premium should not be recovered from the underwriter; but if it is allowed as a general rule, that the premium must be retained, it would be difficult to support a distinction between slight fraud and gross fraud, the difference being merely in degree. It would afford a very extensive latitude to the discretion of the judge, which however necessary in some instances for the purposes of justice, ought carefully to be excluded when a definite rule can be conveniently applied*.

* It has been decided by a case, not before me when this essay was written, that in case of an actual fraud by the insured or his agent, the underwriter might retain his premium.—*Chapman v. Frazer. Park, 218.* There is no report at length of the decision, and it is not easy to accede to it on principle. If the underwriter elects to have the insurance considered as void, he elects to treat the premium as paid without consideration. He receives a benefit, when according to the fact disclosed he was never subject to any risk. The decision introduces a penal consequence in favour of an individual, which, however reprehensible the conduct of the opposite party may be, is not supported by any analogy. It might be very desirable on any future occasion

CHAP. XI:

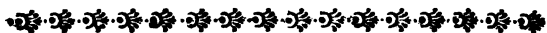
Of Sea Worthiness.

IT is an implied condition in every policy of insurance, that the ship shall be sea worthy at the commencement of the voyage: no ignorance of the circumstance will dispense with that condition, as the indemnity against extraordinary perils, is founded upon a presumption of general sufficiency; but a defect which has arisen during the voyage, but before the insurance, is not within the condition. The want of sea worthiness in the ship also vacates a policy on the goods, and leaves the party to whom they belong, to his remedy against the owners. The same principle has been extended further in a modern case, where a ship was lost in the River Thames, not having a pilot on board; and on that account the insurance was held to be forfeited. Lord Kenyon stating it as an admitted principle, that the assured cannot recover unless they equip the ship with every thing necessary for her navigation during the voyage; the ship herself must be sea worthy, she must have a sufficient crew, and a captain and pilot of competent skill. His lordship declined giving an opinion

to put that question in a course of solemn examination, by a proceeding which has unfortunately fallen so much into disuse as to be almost thought offensive.

whether it was absolutely necessary that the pilot should be qualified according to the act, for the regulation of pilots in the River Thames, especially if the captain had taken a pilot who represented himself as duly qualified, and whom the captain really believed to be so.—*Law v. Hollingworth*, 7 T. R. 160.

Where the master of a vessel employed in the slave trade, had not a certificate conformable to the acts for regulating that trade, the insurance was decided to be void.—*Farmer v. Legg*, 7 T. R. 186.



CHAP. XII.

Of Illegal Voyages.

ACCORDING to the principles which are applicable to contracts in general, no policy can be supported upon a voyage which is contrary to the provisions of the law, and this observation equally applies, notwithstanding the insurer should be fully apprized of the circumstances inducing the illegality at the time of this subscription. The law will give no aid to agreements founded upon its own infraction. Therefore, when an act had passed, prohibiting all commerce with New York—*Johnson v. Sutton*, Doug. 254—so when the king, by virtue of his prerogative, lays an embargo upon vessels in time of war, which prerogative extends to neutral vessels in British ports—*Delmadu v. Motteaux*, Park. 244, the insurance upon voyages,

attempted in contravention of these restrictions, was ruled to be void.

Under this head are also comprized voyages in contravention of the exclusive privileges of the East India Company, *Camden v. Underfon*, 6 T. R., 723, 1 Bos. and Pul. 273, and of the acts of navigation.

Two recent cases, of considerable importance have arisen respecting the exceptions created by the treaty with America, and applying to both those systems. By that treaty, confirmed by Stat. 37, Geo. III. c. 97, the United States of America are allowed to trade with the British territories in the East Indies. It was held, that according to the treaty and act of parliament, a native of Great Britain domiciled in America, was included in the provision; also, that the trading from America to India, need not be direct, but might be carried on circuitously through any country in Europe, including Great Britain. Another question agitated in the cause was, whether as the voyage commenced before the signing of the treaty, in contemplation of a trade to the East Indies, that did not render the whole illegal: but as it did not appear that the intention was to sail to the British territories, there was no foundation of fact to support the argument: but Lord Kenyon admitted, that if there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, so that the assured could not recover upon

a policy upon any part of it.—*Wilson v. Marryat*, 8 T. R. 31,—1 B. and P. 430.

There is an article in the treaty which provides that the vessels of the United States shall not carry any articles *exported from* the British territories except to some place in America; therefore when such goods had been exported from Bombay to Canton, under a void permission from the governor and council of Bombay, an insurance of the ship *at and from* Canton to Europe, was of no validity, because, during part of the time that the parties intended that the policy should attach, namely, while the ship was *at* Canton, there was something illegal in the transaction. But in the same case it was decided, that the insurance on goods purchased at Canton with the proceeds of the goods so illegally exported, was binding, (it being found by the jury as a fact, that the voyage from London to Canton, and from Canton to Europe, were two voyages.) All the judges concurred in the opinion which was most pointedly expressed by Mr. Justice Lawrence, that in such a case they could not inquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods. If the money were obtained by robbery on the highway, and invested in the purchase of a cargo, he did not know why that cargo might not be legally insured. In order to render the insurance illegal, the illegality must exist during the voyage insured.—*Bud v. Appleton*, 8 T. R. 562.

No country pays any attention to the revenue laws of another; therefore, if a policy is effected here upon a trade to the Spanish territory, contrary to the revenue laws of Spain, *Vi. v. Fletcher*, Doug. 228—*Lever v. Fletcher*, Park, 239, it is obligatory; but a detention by the ruling powers of that country, for an infraction of their law, would not be such as could be covered by the insurance. The degree, in which trade with an enemy in time of war is illegal, has been the subject of much discussion, but upon a very full investigation it has been settled by a decision of the court of admiralty—*The Hoop*, Robinson's Rep. 196, followed up and recognized by a judgment of the King's Bench, *Potts v. Bell*, T. R. 548 that trading with an enemy without the king's licence, is illegal in British subjects, and that consequently the insurance upon such trading is void.

The legality of insuring the property of an enemy has also been the subject of very considerable discussion. In the present war with France, insurances on French property are, by particular act of parliament, rendered not only void, but highly criminal. Upon the general question it seems to have been strongly the disposition of Lord Mansfield to favour such insurances. But by two decisions of the King's Bench, it is now settled that they are illegal.—*Brandon v. Nesbit*, 6 T. R. 33—*Bristow v. Towers*, 6 T. R. 35.

CHAP. XIII.

Of Prohibited Goods.

THERE are acts imposing penalties on both parties upon any agreement by insurance, or otherwise to deliver goods imported without paying duties, or any prohibited goods, or for the carrying sheep or wool beyond seas, 4 and 5, W. and M. c. 15.—28 Geo. III. c. 38, but these seem referable principally to cases in which there is some concurrence in the illegal transaction, rather than to common policies. All policies made on goods in general, which afterwards appear to be wool, prohibited from exportation, or upon any ship which should have such wool on board, are declared to be void, notwithstanding any words which may be used, 12 G. II. c. 21.—28 Geo. III. c. 38. As a general proposition, insurances upon goods prohibited to be exported or imported by positive statutes, or by the king's proclamation in time of war; or which, from the nature of the commodity, and by the laws of nations, must necessarily be contraband, are void.

It is agreed, that the taking of necessaries to a place which is besieged, is contrary to the law of nations, and all goods of that description may be intercepted and sold; and therefore all insurances,

contrary to this principle, cannot be sustained. Bynkershoek maintains the opinion, that carrying *any thing* to a place besieged, is contrary to the law of nations; and from the late decisions of the court of Admiralty, in cases of blockade, that seems to be the true doctrine.—Vi. Robinson's Reports.

It has been already mentioned that one country takes no notice of the revenue laws of another. In this observation may be decided all other laws of positive regulation. With regard to these it seems to be the policy of different states to counteract each other; on the one hand to secure exclusive national advantages, on the other, to defeat the measures which are adopted for the purpose.



CHAP. XIV.

Of Wager Policies.

WAGERING policies have been accidentally alluded to as we proceeded. From the review taken by Mr. Park, of the cases upon the subject, it appears, that contracts of insurance, *valued free from average, interest or no interest*, were originally introduced as real policies of indemnity, were the trader did not think proper to disclose the nature of his interest; and that if in fact there was no interest, the insurances were, at an early period,

considered as void; but in process of time, the legality of them was allowed, and the number and consequences of policies, which merely amounted to wagers upon the safety of ships and goods, produced the interposition of the legislature.—19 Geo. II. c. 37. The act upon this subject takes notice, that the making of such assurances had been productive of many pernicious consequences, whereby great numbers of ships, with their cargoes, had either been fraudulently lost and destroyed, or taken in time of war, and that they had also encouraged the exportation of wool and other prohibited and clandestine trades. It was therefore provided that all insurances on the *ships of his Majesty, or any of his subjects, or upon any goods on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage in the assurer*, should be void, with a proviso, that insurances on private ships of war, fitted out by any of his Majesty's subjects, solely to cruize against his Majesty's enemies, may be made for the owners, interest or no interest, free of average, and without benefit of salvage.—There is also an exception of effects from any places in Europe or America in the possession of Spain or Portugal. There is a special provision respecting bottomry and respondentia upon East India ships. It is settled that foreign ships are not within the scope of this act.—*Thellusson v. Fletcher*, Doug. 315.—*Crawford v. Hunter*, 8 T. R. 13. Indeed the language of the

act is special and confined to ships of his Majesty, or his subjects.

The act has been held, not to prohibit valued policies, unless they are merely illusory, and effective wagers—to use the language of Lord Mansfield, “if it should come out in proof that a man had insured 2000*l.* and had interest on board to the value of a cable only, there never has been, and I believe never will be a determination, that by such an evasion the act may be defeated. There are many advantages from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion.”—*Lewis v. Rucker*, 2. Bur. 1167. Of course, a mere excess of value in a real contract of indemnity is no objection, and such a valuation is, in fact, necessary for the purposes of a complete indemnity; for the value of the ship, or the prime cost of the goods, are all that can be recovered upon an open policy, whereas the outfit, commissions, expences, premium of insurance, and a moderate profit must be included to put the assured, in case of loss, in the same situation as if there had been a safe arrival, and these considerations are independent of any accidental fluctuation in the state of markets. An insurance upon the profits of a cargo of molasses, belonging to the plaintiff who had a contract with government, and valued at 2000*l.* was deemed valid—*Grant v. Parkinson*, Park, 267. And Lord Kenyon has intimated his opinion in favour of a valued policy, on the com-

millions of the consignee of a cargo.—*Flint v. Le Mesurier*, Park, 268. The court of Common Pleas have decided, that a creditor of the consignor of a cargo, for whose use the consignee was directed to apply a part of the cargo, had an insurable interest.—*Hill v. Secretan*, 1 Bos. and P. 315.

It was also held by Lord Mansfield and the court of King's Bench, that the officers and crew who made a capture, have such an interest as is the subject of insurance. The circumstance of the insured having the possession, and a certain expectation of receiving the property captured for their own emolument from the crown, supported the contract, and his lordship said, that if a man is made an agent for prizes, he has not the possession of the property; yet he has such an interest in any ship coming home, that he may insure.—*Le Cras v. Hughes*, Park, 169. And very lately it was held, that the captors of a prize which was restored, could not sue for a return of premium, as having made an insurance without interest. Lord Kenyon said, "That the captors had the possession of the property, and from that possession certain rights and duties accrued. If the capture were improperly made they were liable to be called to an account in the Admiralty for damages and costs. They had therefore a right to insure themselves against the decision that might have loaded them with damages and costs. It was important to them to take care that there should be something forthcoming

to answer for the amount of those damages." Mr. Justice Grose observed, "That the whole difficulty has arisen from confounding an absolute indefeasible interest with an insurable interest." Mr. Justice Lawrence, "The case turns on the short question, whether the insured had, or had not, an interest which they might insure? Did they mean to game; or was not there a loss against which they might indemnify themselves by a policy of insurance? I do not mean a certain but a possible loss. It has been shewn that there was a case in which they might have been decreed to pay damages and costs, and that is sufficient."—*Boehm v. Bell*, 8 T. R. 154.

It has also been held by the court of King's Bench, that the commissioners, appointed by act of parliament, for taking care and disposing of Dutch ships and effects brought into this kingdom, had an insurable interest as trustees, consignees, or agents—*Crawford v. Hunter*, 8 T. R. 13. But this case is still in litigation on a writ of error.

An agreement upon payment of 20l. to pay 1000l. upon the arrival of an East India ship in the Thames, if she did not save her passage to China, was held to fall within the prohibitions of the act. It was truly said, that if it were allowed all wagering policies would be turned into this form, and the act would be effectually evaded.—*Kent v. Bird*, Cowp. 583.

A person insured a vessel, on account of the cap-

tain being indebted to him upon a bond, which is no insurable interest. After the risk was over, he sued for the premium as paid without consideration, but it was decided that he could not recover.—*Lowry v. Bourdieu*, Doug. 451.

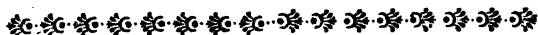
The exception with respect to Spain and Portugal, is shewn by Mr. Park to have been occasioned by the regulations of those countries respecting their colonies, but to be more extensive than the object of it required.



CHAP. XV.

Of changing the Ship.

MR. Park has shewn, in a chapter appropriated to the subject, that if goods are insured on board any ship, the assured cannot substitute another before the commencement of the voyage, nor during the course of the voyage remove the property insured to another ship, without the consent of the underwriter, or without being compelled by a case of unavoidable necessity.



CHAP. XVI.

Of Deviation.

IT is fully established that any unnecessary deviation.

W

tion from the proper course of the voyage, terminates the insurance, without regard to its actually increasing the danger, or influencing the loss which may afterwards take place. To admit a discussion of the degrees in which deviations might be material or otherwise, would be productive of continual uncertainty and litigation, and it is evidently more beneficial to adhere inflexibly to the general rule which renders it fatal. Any improper delay is also fatal in the same manner as a deviation. Therefore, where a vessel insured at and from the coast of Africa to the West Indies, stayed on the coast from August to March, and was employed as a receiving ship for other vessels; this was ruled to be equivalent to a deviation. Lord Mansfield said, "The point is, whether the risk has not been varied; it is not material whether or not the risk has been greater." If a ship insured for a trade has been turned into a floating warehouse, or a factory ship, the risk is different: it varies the stay; for while she is used as a warehouse, no cargo is brought for her—*Hartley v. Buggin*, Park, 313. It has been held, conformably to what appeared the usage of merchants, that a merchant ship carrying letters of marque, may chase an enemy, and the losing fight for five or six hours in the night, was decided by the jury, not to defeat this right—*Jolly v. Walker*, Park, 299. Going out of the way to cruise is agreed to be a deviation—*Cock v. Townson*, Park, 298.

If the deviation is involuntary, and the crew by

force compel the master to come back with a prize, it is an act of necessity, and therefore is excused—*Elton v. Brogden*, Str. 1264. Necessary reparation, or the avoiding of a storm, are justifiable causes of deviation—*Motteaux v. London*, Afs. 1 Atk. 545—*Gilbert v. Readshaw*, Park, 80. And if a storm drive a ship out of the voyage into any port, and being there, she does the best she can to get to her port of destination, she is not obliged to return back to the point from which she was driven.

That position was laid down by Lord Mansfield in a case wherein it was also decided, that a vessel insured from St. Kitt's to England, having driven out of St. Kitt's, and being obliged to go to St. Eustatia's, did not forfeit the insurance by completing her cargo there. It appeared in that case to be usual, where a captain had not taken a full cargo at St. Kitt's, to take in the rest at St. Eustatia's, *Delany v. Stodart*, 1 T. R. 22; but the general position of Mr. Park, that "completing a cargo at the port to which a vessel is driven, does not destroy the policy, provided every thing was done that could be done under such circumstances, for the benefit of the adventure," may be fairly deduced from the manner in which the case was discussed.

It is settled by many determinations, that if a ship go to the usual place of rendezvous for the sake of joining convoy, though such place be out of the direct course of the voyage, it is no deviation. From the direction given by Lord Mansfield

in a case mentioned by Mr. Park, that if a captain had no other view or motive but to come the safest way home and to meet with convoy, the insurance continued good.—*Enderby v. Fletcher*, Park, 307. It may be inferred that the preceding proposition is not merely confined to going to a common place of rendezvous.

Other instances of justifiable deviation may occur whenever the security of the voyage is the only object in contemplation—Park, 310.

From what was formerly mentioned, it is evident that nothing can be considered as a deviation which is in the ordinary and accustomed course of trade; but a few casual instances will not, without a regular habit, be sufficient to justify a deviation—*Vi. Elliot v. Wilton*, 7 B. p. 6, Park, 295—*Salisbury v. Townson*, Park, 309.

A policy was from Gottenburgh to *Leith and Cockerzie*, and though Cockerzie was nearer to Gottenburgh than Leith, it was held, that as the intended voyage was described in the policy, and as there was no regular and settled course known to all the traders, different from that so described, the ship deviated by putting into Cockerzie first—*Beatson v. Haworth*, 6 T. R. 531. Sometimes there is a particular liberty for deviation, the extent of which is a question of construction. It has been held by Lord Kenyon, that a liberty *to touch and stay*, does not include a liberty to trade; so as to break bulk, even though the ship is not thereby delayed—Still

v. Wardell, Park, 295. Also, that a liberty to call at any one port in Portugal, on a voyage from Lisbon to England, must be restrained to a permission to call at some port to the Northward of Lisbon, in the course of the voyage to England, and that by going southward, the assured had been guilty of a deviation.—*Hogg v. Horner*, Park, 298.

“If, from necessity, one course of voyage is substituted for another, it is incumbent on the insured to pursue the voyage of necessity directly, in the most expeditious manner. The deviation must be justified both in substance and manner. Nothing more must be done than what the necessity requires.” These observations were applied by Lord Mansfield, to a case where the master, alledging a justifiable case of deviation, had stopped and traded in a manner which the alledged necessity did not require.—*Lavabre v. Waller*, Doug. 285.

If there is merely an intention to deviate from the voyage insured, though formed before the inception of the voyage; (*Kewley v. Ryan*, 2 H. B. 343;) and a loss arrives before the dividing point, it is no objection; but if the intention is to pursue a voyage specifically different in its destination, the policy can be no indemnity, although the vessel may be lost at a place falling within the course of the voyage insured*.

* *Wooldrige v. Boydell*. Doug. 16. In that case Lord

There are two modern cases referable to this head, with regard to the effect of taking out a letter of marque. In the first of them, *Dennison v. Madigliani*, 5 T. R. 580, (which I conceive to be the only printed case upon the law of insurance that has been omitted by Mr. Park), the vessel insured outward, had put back for stress of weather, and was there detained by embargo: being so detained, the assured applied to the underwriters for leave to take a letter of marque, which after a good deal of mutual communication, was refused. They then took out a letter of marque without leave; and it appeared to the satisfaction of the jury, that the letter of marque was taken on board solely for the purpose of enabling the ship to avail herself of it in the homeward voyage, and that it was not intended to be made use of in the outward voyage, and that there was no deviation in any respect. The court of King's Bench held, that the insurance was forfeited. Lord Kenyon, after adverting to the al-

Mansfield observed, that "all contracts of insurance must be founded on truth, and the policies framed accordingly. When the insured intends a deviation from the voyage described, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance was made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation."

legation of there being no intention to use the letter of marque, aded that it was enough for him to say, that the captain had a temptation to deviate, and that this was such an essential alteration of circumstances from the condition of the vessel at the time of insurance, as ought to discharge the underwriters, unless it was done with their consent. Mr. Justice Grose, (the only other judge who spoke upon the cause) laid, that the risk of insuring a mere trading ship, is very different from that of one carrying letters of marque, the premium is certainly higher in the latter than in the former case. This was a direct departure from the nature of the contract, as understood between the parties. The intention does not get rid of the objection; for though no use was made of it, yet being a general letter of marque, the captain had power to make use of it as he pleased, and it certainly held out a temptation which was altogether repugnant to the nature of the contract entered into, and contrary to the professed understanding of the contracting parties. Both of the above learned judges laid considerable stress upon the application for leave to carry out a letter of marque.

In the other case, *Moss v. Byrom*, 6 T. R. 379, the intention not to use a letter of marque, and its having been merely taken to quiet the apprehensions entertained by sailors of the treatment they would receive in case of capture, and to induce them to engage, indisputably appeared from several circumstances, particularly the not taking

out a certificate of clearance, without which the letter of marque is void : and the insurance was supported. Lord Kenyon said, that the preceding case which was decided upon principles that were new, and which went to the extreme verge, had been much pressed upon them in the argument of the present case as binding it ; but that case ought not to be extended further, and the present was clearly distinguished from it. He confessed that he wished that case had appeared on a special verdict in order that the parties might, if they had pleased, have carried the record to the dernier resort, for he understood that the decision had been doubted, though on a review of the case he did not know that it was improperly decided. In that case legal letters of marque were taken out for the ship, and though the underwriters expressly refused their consent, the assured nevertheless obtained them ; and they could have been obtained for no other purpose but that of empowering the ship to make captures, whereas here, no legal letters of marque were taken out, for it appeared that no certificate was obtained, without which, the letters of marque were void ; and it appeared that they were only taken out for the purpose of procuring seamen. Mr. Justice Lawrence made some observations to the same effect, and said, that when the seamen were procured, the letter of marque ceased to have its effect, and then it was the same as if there had been no letter of marque on board at all.

The first observation that occurs upon the case

of *Dennison v. Madigliani*, is, that the decision refers rather to the particular circumstances of an application to the underwriters shewing the opinion of the assured, and the intention not to use the letter of marque on the part of the voyage which was the subject of the insurance, as furnishing an exception, than to the broad and general question, whether taking out the letter of marque without any concomitant act inconsistent with the pursuit of a trading voyage, is sufficient to vacate a policy. It must be agreed that the possession of such a paper did not in itself, increase the risk either from natural perils, or from a state of warfare. It will also be agreed, that any actual deviation from the regular pursuit of the trading voyage would terminate the contract, notwithstanding such possession; (admit for the purpose of the argument, that the contract, independently of such deviation, continued to subsist.) The observation that the risk of a mere trading ship is very different from that of one carrying letters of marque, and the premium is higher, is certainly true, as applied to the case of a ship insured as carrying letters of marque; for there a different course of navigation is allowable: to chace is not to deviate, but an act within the scope of the indemnity. But this observation does not reach the case of a common insurance, where there is in fact no deviation from the regular course, and where it is admitted that such deviation would be fatal. It is said, that as the letter of marque was general, the captain had power to make use of it as he pleased.

That was only an answer to the argument founded upon particular intention. The reply recurs, that as against the underwriters he had no power to make use of it at all, and the effect of it in other respects was a question in which they were not concerned. It was urged in argument at the bar, and truly, that an intention to deviate will not affect the policy; and if the intention will not, much less should a mere temptation, however strong, without such intention. As to the application to the underwriters, no arguments can be more fallacious than those which finally resolve themselves into the apprehension of a party upon a question of law. A man will not, in a court of justice, be under any prejudice from having extra-judicially made the most direct and positive admission of a point of law unfavourable to himself; and it is unreasonable that any thing which at the utmost amounts to no more than an implication of such admission, should be allowed to have a greater force than the admission itself. A doubt upon a subject should always be a sufficient inducement in point of prudence, to take precautions which may insure a favourable event; but the taking such precautions should not have the effect of defeating the interests which they were merely intended to secure.

CHAP. XVII.

Of Warranty.

A WARRANTY is a condition expressly included in the policy of insurance which must be strictly and literally complied with, not admitting any exception in respect of necessity, materiality, or any other circumstance. It differs from a representation, as that only affects the validity of the policy, provided the circumstances stated are material to the risk; and a performance in substance is sufficient, whereas a warranty is absolute and imperative. It is an essential ingredient in the contract; rendering it hypothetical, and cannot be dispensed with under any circumstances whatever. A warranty must be part of the insurance itself, and contained in the same instrument; a written memorandum inclosed in the policy, or watered to it, is not sufficient for the purpose. Its being written on the margin or in the body makes no difference. —Pawson v. Watson, Cowp. 790—Bize v. Fletcher, Doug. 12—Bean v. Stupart—Kenyon v. Berthon, Doug. 12. No particular words are necessary for this purpose, but in general any declaration respecting the ship or voyage making part of the instrument is a warranty. “*Sailed from Liverpool with fourteen 6-pounders, swivels, small arms, and fifty hands, copper sheathed,*” was ruled

to be a warranty in an assurance at and from Africa, and the vessel having sailed with only forty-six hands, the policy was void—*De Hahn v. Hartley*, 1 T. R. 343.

But if the literal terms of a warranty are complied with, nothing further is requisite. A vessel insured, lost or not lost, warranted *well this 9th of December*, was lost on the 9th of December before the policy was subscribed, which was adjudged sufficient to satisfy the warranty—*Blackburn v. Cockell*, 3 T. R. 360.

The three cases of warranty which most frequently occur, and which are particularly considered by Mr. Park, relate to the time of sailing, to sailing with convoy, and to neutrality. If a vessel is warranted to sail on or before a given day, unless she actually sails by that day, though prevented by an embargo, the policy is void—*Hore v. Whitmore*, Cowp, 784. If the warranty is to sail on, or after a given day, the sailing before that day is equally fatal—*Vizian v. Grant*, Park, 326.

What shall be considered as sailing within the meaning of these warranties, has been the subject of considerable discussion. A vessel insured at and from Jamaica, warranted to depart on or before the 1st of August, sailed within the limited time from St. Ann's in that island, with intent to join convoy at Bluefields, the usual place of rendezvous, and was immediately afterwards stopped by

an embargo, and detained until after the 1st of August. The going to Bluefields having no other object than the pursuit of the voyage, according to the safest course of navigation, it was ruled, that the warranty had been complied with—*Bond v. Nutt, Cowp. 901.* In a subsequent case, the warranty was to sail from Guadaloupe on or before the 31st of December. Within the time, the vessel sailed from Pointe à Pierre, expecting to meet with convoy at Basseterre, in the same island, and received her passes under the express condition of calling for the Government dispatches at Basseterre, which must have been passed in the regular course of the voyage. She was detained by an embargo at Basseterre beyond the day mentioned, but the voyage having commenced, and been stopped by accident, the warranty was complied with,—*Thellusson v. Ferguson, Doug. 361.* The great value of the property which gave rise to these decisions, occasioned a very minute examination of the law; but the decision themselves being now constantly referred to as possessing the highest authority, and giving the law upon the subject, it will not be necessary to state the observations by which they were accompanied.

With respect to the warranty to depart with convoy, the convoy must be the regular force, appointed by the Government of the country. The mere protection and company of an armed vessel is not sufficient.—*Hibbert v. Pigon, Park, 339.* Mr. Park properly infers, that a convoy

OF WARRANTS.

appointed by the admiral commanding in chief upon a station abroad, is a convoy appointed by Government. The necessity of having sailing orders, in order to comply with a warranty of departure with convoy, has often been incidentally the subject of discussion. This point has lately come more directly under the consideration of the court of Common Pleas in two cases, the result of which is, that such orders must, if possible, be obtained before the time of sailing; but the possession of them does not so essentially constitute a part of the definition of sailing with convoy, that they may not be dispensed with, under circumstances of necessity or excuse; as the state of the weather, or the refusal of the commander. In one of these cases Admiral Christian, according to the note of his evidence, by Lord Chief Justice Eyre, distinguished accurately between ships under the protection of a fleet and ships under convoy. All friends are protected while they are in reach of protection; but ships under convoy are under controul; that can be spoken to in a language which they understand. The convoy would fire at them if they misbehave; and according to Lord Eldon, the reason of the rule which requires that the convoy should be appointed by Government, shews the necessity of having sailing instructions, since without them the ship does not stand in that relation, or under those circumstances in which she can take the full benefit of the Government convoy. "If the fleet be dispersed by a storm, how is she to learn the place of rendezvous? If it be attacked by

the enemy, how is she to obey signals? In short, what communication can the protected have with the protecting force?"—*Vi. Webb v. Thomson*, 2 B. p. 5—*Anderson v. Pitcher*, 2 id. 164. It can hardly be necessary after what has been premised, to add, that if the warranty is not regularly complied with, the policy is void, although the loss may be occasioned merely by the perils of the sea.

A warranty to sail with convoy, is construed to mean a sailing with convoy from the nearest usual place of rendezvous—*Lethulier's Case*, 2 Salk, 443—*Gordon v. Morley*, 2 Str. 1265. There is never any convoy from the port of London; but an insurance from London, warranted to sail with convoy, is complied with by sailing with convoy from Spithead, that being the regular course. It is settled, (*Lilly v. Ewer*, Doug. 72,) that a warranty to depart with convoy, must mean with convoy for the voyage, and not such as may separate in a minute or two, or at any intermediate period, notwithstanding respectable mercantile opinions were offered, that a convoy for the voyage, if intended, must be specially expressed. But if the convoy is destined for the voyage, the insurance continues valid, notwithstanding an accidental separation—*Jefferies v. Legendra*, 2 Salk, 443. If there are relays of convoy, or if the convoy leaves the vessel put under its protection, at a place considered by the Government as sufficiently near the place of destination, the warranty is com-

plied with; for the captain of a merchant ship cannot know the orders of the admiralty, and must take such convoy as he finds—*D'Eguino's v. Berwick.* 2 H. B. 554.

Upon a warranty of neutrality it is sufficient if the vessel be neutral at the time of sailing. This has been positively settled by different cases, *Eden; v. Parkinson*, Doug. 732—*Tyson v. Gurney*, 3 T. R. 477, and is now an admitted rule of law. There does not appear to be any determination upon the point of war commencing between the time of effecting the policy and the commencement of the voyage. Perhaps the true conclusion may be, that such a warranty only relates to the character of the vessel when a policy is subscribed. *Mrs Park* observes, "That if this warranty is not complied with, the policy is absolutely void from the beginning on account of fraud." If that observation is universally true, it induces the consequence that the object of the warranty is confined to the time of the contract being made.

The cases respecting this species of warranty, are chiefly referable to the effect of foreign sentences of condemnation; and it is agreed, that the sentence of a foreign court of competent jurisdiction, is conclusive as to every thing which it was intended to decide. This position has been strikingly exemplified in recent instances; for the French courts having, in their sentences for the condemnation of American property warranted neutral, set forth a series of absurd and frivolous pretences,

indicating a mere piratical disposition to appropriate whatever they could seize, and having drawn the conclusion contrary to every principle of reason and justice, that the property belonged to the enemies of France, the English courts have felt themselves bound by the authority of such decisions, and incompetent to examine the principles upon which they were founded.—*Vi. Geyer v. Aguilar*, 7 T. R. 681. A contrary line of conduct would have afforded the example of dispensing with, and eventually subverting a very beneficial rule, by admitting the examination of circumstances where a subject is concluded by authority. No formality of expression is requisite; and if it manifestly appears that the condemnation was as enemy's property, that is sufficient.—*Barzillay v. Lewis, Park*, 359. But if there is any ambiguity in the sentence, so that it does not appear whether the condemnation was upon the ground of being enemy's property, or upon a positive regulation; as an arret for declaring vessels prize, if any papers have been thrown into the sea, the truth of the case may be shewn.—*Bernardi v. Motteaux*, Doug. 575. Were a vessel warranted American, was condemned in France, on the ground that her true destination appeared to be for the English islands, having loaded in London, and having a quantity of gunpowder on board, the sentence was held not to be conclusive against the warranty, the facts and the reasons given leading to a contrary conclusion.—*Calvert v. Bovill*, 7 T. R. 523. If no special ground of condemnation appears, it is equi-

Ev.

Y

valent to a positive sentence of condemnation as enemy's property.—*Saloucci v. Woodmats*, Park, 362. But one country is not bound by the arbitrary and oppressive regulation of another, contrary to the law of nations, acted upon as a specific ground of condemnation, and not falling within the principle of rendering particular circumstances essential to the proof of neutrality; therefore the underwriters were adjudged to be answerable where a vessel warranted to be Portuguese, was condemned, because she had an English supercargo. *Mayne vers. Walter*, Park, 363. There are two late cases proceeding upon the same principle, which have been submitted to in a great many others, as concluding the law upon the subject. In one of them (*Pollard v. Bell*, 8 T. R. 434.) the reporters wisely forbear entering into the detail, and observe that the sentences of the French courts condemning a Danish vessel, were set forth at large in the special case, but being unusually long and complicated, introducing a variety of irrelevant matter and false reasoning, they are omitted in the report, as they could not fail of disgusting every person on whom the task of reading them should be imposed. It may be sufficient to state that they recited several French ordinances, particularly one, which declares that all ships shall be confiscated wherever there shall be a chief officer, being an enemy. In the other, the particular ground of condemnation of an American vessel is not stated; but it appeared to the court to be simply an infringement of French ordinances, and not any

Breach of the law of nations, or of the treaty between France and America—*Bird v. Appleton*, 8 T. R. 562.

A ship was condemned on account of refusing to be searched, and resisting with force; and this was adjudged not to vacate the policy upon a warranty of neutral property, the court being of opinion that a neutral ship is not bound to stop to be searched, and that it is rather an act of superior force, always resisted when the party is able. Two important observations were made respecting general principles connected with the subject in dispute. A ship warranted neutral, must conduct herself so as not to forfeit her neutrality. A ship is only bound to take notice of the laws of the country she sails from, and of that to which she sails, but not of the particular ordinances of other powers—*Saloucci v. Johnston*, Park, 364. But subsequent to the decision of this case, Sir William Scott has, in a most able judgment, and upon examination of the great authorities respecting the law of nations, decided in favour of the general right of belligerents to search neutral property, and of the liability to confiscation in case of resistance. The case has been solemnly argued, and is now standing for judgment in the court of Appeal. Supposing the sentence of the court of Admiralty to be confirmed, the forfeiture of the insurance will arise, not from a falsified warranty, but from pursuing a conduct which being repugnant to the law of nations, will equally attach whether there is a warranty or not.

The doctrine that a condemnation in a court of Admiralty, of a vessel having "forfeited her neutrality by resisting the right of search," was conclusive against the insured, has, in a case of warranty, been established by the court of King's Bench, who held, that the adjudication of a vessel having *broken her neutrality, and acted contrary to the law of nations, and the faith of treaties* precluded the discussion of the question, whether the right of searching existed by virtue of any such treaties. The general question was not in that case taken into consideration—*Garrets v. Kensington*, 8 T. R. 230.

Amongst the other unprecedented conduct of the French in the course of the present war, has been the establishment of tribunals in neutral countries, for the condemnation of vessels, carried by them into such countries as prizes. Sir William Scott applying the same ability to that subject, which marks his decisions on every other, clearly evinced the nullity of all proceedings by such a pretended tribunal, and shewed it to be the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country—*Case of the Fladøzen Robinson*. 135. The court of King's Bench have adopted his decision, and in a case embracing the same point, determined accordingly.—*Havelock v. Rockwood*, 8 T. R. 268.

A case lately occurred of a vessel warranted *American* property, which sailed from England with-

out having a document required by the treaties between America and France, in case of either country being engaged in war, but received it at Guernsey, and was afterwards lost by the perils of the sea. As there was a part of the voyage, during which she was not supplied with the proper voucher of neutrality, the policy was decided to be void.—*Rich v. Parker*, 7 T. R. 705. But a very proper animadversion was made by one of the judges, upon taking advantage of such an objection. The doctrine involved in that case, is stated in the following terms, by Mr. Justice Lawrence, in one of the cases above cited, and decided upon a different ground, (*Pollard v. Bell*,) “that where a state, in amity with a belligerent power, has, by treaty, agreed that the ships of their subjects shall only have that character, when furnished with certain precise documents, whoever warrants a ship as the property of such subject, should provide himself with those evidences which have, by the country to which it belongs, been agreed to be the necessary proof of that character.”

The following decision of the court of Common Pleas of Philadelphia, is perfectly agreeable to the spirit of the English law.—An insurance was made on the outward voyage with a warranty that orders would be given that the ship should not cruise. No such orders were expressly given, but the intention that there should be no cruising was sufficiently clear. It was decided, that the warranty was not complied with. The following is

the substance of the judgment given by Mr. Shippen, the president.

“ It is contended, that sufficient appears on the face of the instructions, considering the unwarlike condition of the vessel, and the intent of the voyage, to shew, that though no express direction is given *not to cruize*, yet such an implied direction is given, as will satisfy the words of the warranty.

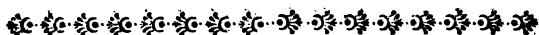
“ The general intention of the owners, to be collected from the instructions, is sufficiently clear, that they did not mean to give the captain a *power to cruize*. But what was the intention of the parties in making the *warranty*? Was it, that such orders should be given as by construction or inference, should shew *that* to be the intention of the owners? or, was it not, that the captain should be directed in express terms *not to cruize*?

“ If the warranty had been that *no orders should be given to cruize, or that he should not be empowered by his orders to cruize*, these instructions would certainly have been a compliance with the warranty; but the warranty is not *negative*, that he should *not* have orders to cruize, but positive that he should *have orders not to cruize*. And in which ever way the warranty had been expressed, if the captain *had cruized*, and the vessel by that means had been lost, *he* would have been answerable. So, that the responsibility of the captain is not any rule to govern the construction of the *policy*, because it

He had cruized *without orders* he would have been equally liable, as if he had cruized *contrary to express orders*. The underwriters have stipulated that *more* should be done than would barely make the captain answerable for cruizing. What their reasons were, we can only conjecture; it might be supposed, that if the orders were silent as to his cruizing, he might be tempted, by an apparent prospect of gain, to do that which he would not dare to do in the face of express orders. It is well known, that there have been many captains who have not scrupled to break orders which were plain and express; but there are many more, who, when their orders are loose or silent, or discretionary, have run the risk of violating the spirit of them, and relied upon the generality or silence of their orders, to justify them to their owners.

“ In the present case, the condition of the vessel did not preclude the possibility of cruizing. She mounted sixteen guns; she had leave, by the terms of the policy, to call at *Beaufort for men*, she was intended to be a cruizing vessel after the outward bound voyage was completed, and it might not be an unreasonable suspicion in the underwriters, that the captain, unless expressly restrained, might be tempted to cruize in the outward bound voyage. Whatever their reasons were, the underwriters had certainly a right to make it a part of their contract; without it, they might have refused to insure at all, or they would perhaps, have demanded a higher premium; and therefore being stipulated, the owners should have complied with it.

"These warranties in policies of insurance are required by law, and by the constant usage of merchants to be strictly complied with; they are generally expressed in a few words, but where they are plain and clear, it would be of dangerous consequence to this useful branch of mercantile business, to introduce a loose construction of them."—*Ogden v. Ash*. 1786—1 Dallas, Rep. 162.



CHAP. XVIII.

Return of Premium.

THE general rules respecting the return of premium have been stated by Lord Mansfield in the following terms.—*Tyrie v. Fletcher*, Cowp. 668. "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he do not run the risk, the consideration for which the premium was put into his hands fails, and he ought to return it. Another rule is, that if the risk has once commenced, there shall be no apportionment or return of premium afterwards." Mr. Park also states it to be an universal custom, that where property has been insured to a larger amount than the real value, the overplus

Premium shall be returned. The distinction between this case and that of a valued policy, is sufficiently apparent. He also intimates an opinion which is evidently just, that if the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured not, the latter will be entitled to have his premium returned on the ground of fraud: but that if both parties be ignorant of the arrival, and the policy be in the usual form, *lost or not lost*, the underwriter should return the premium.

The rule, that if the risk has once commenced there shall be no return, has received some qualification in cases where different portions of a voyage were regarded as distinct risks. A vessel was insured from London to Halifax, warranted to depart with convoy from Portsmouth, (*Stevenson v. Snow*, 3 Bur. 1237) but the convoy having failed before her arrival at Portsmouth, it was resolved, that the assured should receive a proportionate return. There was a usage in favour of the decision, but Lord Mansfield disclaimed proceeding upon that, and in referring to the decision upon a subsequent occasion, observed, that the intention of the parties, the nature of the contract, and the consequences of it, spoke manifestly two insurances, and a division between them. Upon an insurance, *at and from* Jamaica, there was no failing which could be protected by the policy, and it was decided as a general question, that there could be no apportionment by dividing the risk at

Jamaica from that on the voyage—*Meyer v. Gregson*, Park, 389. But it appeared in a subsequent case, that there was a constant and invariable usage under similar circumstances, to return the premium, deducting one half per cent. and the usage was expressly adopted as the ground of decision. The parties were prevented from shewing a usage as to the West India islands in general, and the evidence was confined to Jamaica—*Long v. Allen*, Park 390. But the court of Common Pleas lately considered the subject of apportioning the voyage, as one upon which the law was by no means settled. The jury found a verdict for the return of the whole premium in a case which only differed from *Stevenson and Snow*, by substituting Hull for London, and Bilboa for Halifax; the court granted a new trial, but without stating what the true rule upon the subject was, and seemed to consider the cases as irreconcilable—*Rothwell v. Cooke*, 1 B. and P. 172.

An insurance at and from Harfleur to Angola, at and from Angola to St. Domingo, at and from St. Domingo to France, has been adjudged to be one entire risk on one voyage, and consequently a case upon which, after the inception of the voyage from Harfleur, there could be no return—*Bermon v. Woodbridge*, Doug. 781.

There are two cases by which it is settled, that if an insurance is made for a given space of time, and within that time the vessel is lost under circumstances not protected by the policy, there can

be no return or apportionment of the premium, it being held that the contract was entire at a gross sum for a certain period of time—*Tyrie v. Fletcher*, Cowp. 666—*Loraine v. Tomlinson*, Doug. 585. In one of these cases, (*Loraine v. Tomlinson*) the expression of *at 15s. per cent.—per month*, 18*l.* was relied upon as shewing a distinction of time from month to month; but the court considered that only as the ground of calculating the gross sum which was to be paid at once.

A creditor, by bond of the captain of an East India ship, insured the ship, stating the bond as an interest, and after the safe arrival of the ship, brought an action for the premium as paid without consideration. It was agreed, that this was a gaming policy, and that in point of law no risk had been run; but Lord Mansfield (whose mind had fluctuated upon the subject) with Mr. Justice Ashurst, and Mr. Justice Buller, decided contrary to the opinion of Mr. Justice Willes, that the demand could not be maintained. Mr. Justice Buller seemed to think, that if the action had been brought before the risk was over, it might have been different; but observed, that the party assured waited till the risk, such as it was, (not indeed founded in law, but resting on the honour of the insurer) had been completely run.—*Lowry v. Bourdieu*, Doug. 468.

In a subsequent case, a person made a reinsurance, which was upon argument, decided to be void, and the assured then claiming the premium,

it was held, that the case could not be distinguished from the preceding, and that the insurer was entitled to retain the premium.—*Andree v. Fletcher* 3 T. R. 266.

The propriety of the last decision may be very fairly questioned. In regard to the substantial justice between the immediate parties, it is not only essentially different from, but directly opposite to the preceding. In the first case, the money might be regarded as fairly won by the insurer, upon a contract, which although void in respect of legal obligation, was no wise criminal. There was nothing unconscientious in his retaining the money, and when that is the case, no assistance will be given in the well-known action for money had and received. In the second case, the injustice of the insurer was manifest and glaring, the money was apparently paid under a mistake in point of law, and on the supposition of a valid contract.* The risk insured against attached, so that the engagement of the insurer required him to pay the stipulated damage. He availed himself of the protection of the law, and insisted that the policy was void, and was then allowed to retain the consideration given upon a contract of indemnity, and which he affected to consider as an absolute nullity, and which he had refused to perform.

In an essay on the subject of money being received by one person for the use of another, I have accompanied similar observations on this case, with a more particular examination of the question of

law with which they are connected; and if the result of that examination is correct, the decision last referred to, is not warranted by any fair principle of analogy.

It is common, instead of a warranty for failing with convoy, to insure generally, and stipulate for a return of part of the premium if the ship fails with convoy and arrives. This is evidently the more prudent course, as compliance with a warranty may be prevented by many circumstances of accident or error. It seems singular however that the latter part of the condition should be appended, because, in regard to the distinction of risk, every substantial effect of a warranty to depart with convoy, which can fairly influence the amount of the premium, is attained.

Upon the construction of the word *arrives*, two cases have arisen: in the first, the goods insured were injured by the perils of the sea, so that the underwriters were answerable for a partial loss. Upon a distinct examination of the subject it was properly held, that in the stipulation for a return of premium, no regard was had by the parties to the condition of the goods on the arrival of the ship, the agreement for a return of premium is substituted for a warranty to depart with convoy, and the arrival of the ship shews that she had convoy the whole way, or did not want it.—*Simond v, Boydell, Doug. 255.* In the other case, which is very recent, the vessel had been captured, and before she was taken into port was recaptured, and

brought to her original destination ; but the insurers were answerable in respect of salvage. This was ruled to be a sufficient arrival, and the true construction of the term was held to be an arrival in the voyage insured.—*Aguilar v. Rogers*, 7 T. R., 421.



CHAP. XIX.

Of Reassurances and double Insurances.*

THE act† which prohibits wager policies, also provides that it shall not be lawful to make reinsurance unless the assurer become a bankrupt, or insolvent, or die, in which cases his executors or assignees may make reinsurance to the amount before insured, provided it be expressed to be a reinsurance. A reinsurance is made by the original insurer, contracting upon a given premium with another person to assure his responsibility. The provision respecting it was made in consequence of some abuses which had become prevalent. The prohibition is in general terms, and includes the reinsurance of foreign ships. It was contended a few years ago, that as insurances might be made on

* I have taken these subjects out of the order mentioned by Mr. Park, because double insurances do not fall within the class of cases which furnish matter of defence to the insurer.

DOUBLE INSURANCE.

Foreign ships without interest, such ships were not affected by the other regulation respecting reinsurance.—*Andree v. Fletcher*, 2 T. R. 161. There is an evident difference in the language of the act as applied to the two subjects.

A double assurance differs essentially from a reinsurance, inasmuch as it is not made by the insurer to shift his obligation, but by the assured to increase his security. If the same person makes two insurances he may recover to the full amount of his indemnity upon either, but the several underwriters must contribute amongst each other in proportion to their respective subscriptions. By a double assurance the insured cannot entitle himself to any thing more than a full indemnity.

Two persons claiming distinct interests may make separate insurances; and in case a loss is claimed by one, he cannot be prevented from receiving a complete indemnity on account of the insurance which has been made by the other. The principles respecting this subject were very minutely discussed by Lord Mansfield, in a case involving a considerable number of circumstances, and leading to a conclusion according with the observations that have been made.—*Godin v. London Assurance*, Cowp. 1 Bur. 489, 1 Bl. 103.

It is not intended to take notice of the legal proceedings upon policies of insurance, further than by mentioning, that as a part of the law against insuring without interest, it is provided,

that in all actions upon policies of insurance, the plaintiff, or his attorney, or agent, shall, within fifteen days, after being required by the defendant in writing, declare what sums are assured by him in the whole, and what sums he had borrowed upon respondentia or bottomry for the voyage in question.



CHAP. XX.

Of Insurances upon Lives.

INSURANCES upon lives, when there is a real interest, are of evident benefit to society ; but these, as well as marine insurances, having been perverted from their true design, and rendered instruments of gaming, the legislature has provided that no insurance shall be made on the life of any person *or on any other event* wherein the person for whose benefit the policy is made, shall have no interest, or by way of gaming or wagering. The name of the person interested, or on whose account the insurance was made, must be inserted in the policy, and no greater sum can be recovered on such insurance than the amount of the interest—14 G. III. c. 48.

It has been decided, that when the interest was a note from the person whose life was insured, and of which part of the consideration was a gaming debt; the note being void, there could be no claim under the policy. But in the same case an

Opinion was intimated, that the insurance would be good notwithstanding the person giving it was a minor—*Dwyer v. Edrie*, Park, 432. In another case, a person recovered on a life insurance, whose interest was a debt due from the deceased—*Anderson v. Edrie*, id. *ibid* and *Vi. Tidswell v. Angerstein*, id. *ibid*. and *Peake*, 151. In both these cases it seems to be taken for granted, that the mere existence of such a debt, without any contingency respecting the life of the debtor, or any enquiry as to the sufficiency of his effects, was a good insurable interest. This is certainly not analogous to the doctrine necessarily involved in the case of *Lowry and Bourdieu*; for it was there admitted, that a bond from the captain of the ship, whose solvency might depend upon the completion of the voyage, was not a sufficient foundation for a policy on the ship.

A policy upon the sex of a particular person, has been held to fall within the general prohibition of insurances upon lives *or other events*.—*Roebuck v Hammerton*, Cowp. 737. There are other objections to such a policy, as affecting the feelings of a third person; and therefore a wager on the same subject was ruled to be void. Lord Mansfield, in a case mentioned by Mr. Park, (*Mollison, v. Steeples*, 432.) intimated an opinion which seems to be manifestly just, that the general interest which every man in the kingdom has in the events of war or peace, is not an interest within the act. Mr. Justice Buller has

strongly maintained the position, that the act was an effective prohibition of every wager contract whatever; but that opinion was over-ruled by the decision of the other judges upon the case in which it was expressed.—*Good v. Elliot*, 3 T. R.

The general principles which regulate marine insurances and all other contracts, are applicable to insurance for lives; therefore the probability that a person at sea had been lost in a storm, has been left to a jury as presumptive evidence of his death.—*Patterson v. Black, Park*, 433. Lord Chief Justice Holt decided, that an insurance for a year from the day of the date excluded the day of the date; but that from the date would include it, (2 Salk, 125, 1 Ld. Raym, 480) but in modern policies, the words “the first and the last days included,” obviate any question upon that subject. Mr. Park observes, that the glaring absurdity of sometimes construing those expressions to mean the same thing, at others to be quite different, has been entirely done away by the case of *Pugh and the Duke of Leeds*, in which the court of King’s Bench held, that they mean the same thing; and that they shall either be exclusive or inclusive, according to the context and subject matter, and shall be so construed as most effectually to support the deeds of the parties, and not to destroy them. It may be reasonably doubted whether the principle stated in the case of *Pugh and the Duke of Leeds*, has given any additional certainty to the law upon this subject. According to the particular circumstances of that case, the validity of a lease

depended upon adopting the one construction in preference to the other ; but in general the commencement of a particular term is arbitrary and indifferent, the term must comprise, and cannot exceed its proper limits, whether the day of making the contract is, or is not included. If a policy is made on the 1st of January upon the life of an absent person for a year, it is *a priori* immaterial whether his death on that 1st of January, or on the 1st of January following, shall give a title to recover. The insurance for a year certainly cannot include both ; and perhaps the distinction of Lord Chief Justice Holt may still be deemed correct, unless there are particular expressions or circumstances to indicate an exception.

A representation by the broker, that from the account he had received he believed the life to be good, was held not to affect the validity of a policy, (*Stackpole v. Simon*, Park, 437,) as there was no fraudulent concealment, and he did not pretend to speak from any knowledge of his own. An express warranty that a person is in good health, only implies that he is such a life as might be insured on common terms, and therefore the gout, or any indisposition arising from having received a wound which only affected the comforts of life, and did not increase the probability of death, were decided to be no objections under such a warranty—*Ross v. Bradshaw*, 1 Bl. Rep. 312—*Willis v. Poole*, Park, 439.

CHAP. XXI.

Insurances from Fire.

The cases which have been decided respecting insurances from loss by fire, are very few. The general principles respecting other contracts, and particularly those of marine insurance, equally extend to these.

The printed conditions referred to in every policy, are considered as a part of the policy itself and must be complied with in order to give a right to the party assured. Under an exception that an insurance office should not be answerable for any loss happening by any invasion, foreign enemy, or any military or usurped power whatever, it was contended, that the last words *usurped power*, included the acts of a riotous mob, but the court of Common Pleas, contrary to the opinion of Mr. Justice Gould, decided otherwise. The true construction of the term, as deduced from the context and nature of the subject, was examined by Lord Chief Justice Wilmut, in an argument of distinguished excellence.—*Drinkwater v. London Ass. 2 Wils. 363.* The exception of *civil commotion* was applied to those alarming and destructive riots in the year 1780, the memory of which will be preserved in the history of the country, and the object of which, as expressed by Lord

Mansfield, was general destruction, general confusion, and to aim at the very vitals of the constitution. - His lordship observed, that it was not an occasional riot which would be another question, and upon which he did not give any opinion. He thought a civil commotion was an insurrection of the people for general purposes, though it might not amount to a rebellion, and the jury decided accordingly.—*Langdate v. Mason, Park, 445.* The condition that there shall be a certificate from the minister and churchwardens, which is inserted amongst the rules of every office, has been, in modern cases, ruled to be absolute and imperative. The office only stipulates to pay for a loss upon which such certificate is obtained. If the granting it is improperly prevented by the office, that is a necessary, and perhaps the only exception to the general observation—*Uversley v. Wood, 6 T. R. 701—2 H. B. 574.*

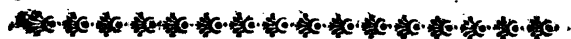
Where an insurance was stipulated to be from half a year to half a year, and so much longer as the insured should pay the premium, and the office agreed to accept the same within fifteen days after the expiration of the former half year, it was decided, that a loss which happened within the fifteen days, the premium not being paid, was not covered by the policy—*Tarleton v. Staniford, 5 T. R. 691—B. and P.*

It has been settled, that an insurance only attaches in case the property continues to belong to the assured at the time of the loss, except under circum-

stances of a transfer of interest specially provided for—*Lynch v. Dalzeill*, 3 Br. p. 6, 497—*Sadler v. Comp. v. Badrock*, 2 Atk. 554.

CONTENTS.

INTRODUCTION.	
CHAP. I. <i>Of the nature and requisites of a policy of Insurance</i>	2
II. <i>The Construction of policies of Insurance</i>	12
III. <i>Losses by perils of the Sea.</i>	18
IV. <i>Capture</i>	19
V. <i>Detention by Princes.</i>	21
VI. <i>Barratry</i>	23
VII. <i>Partial losses and adjustment</i>	27
VIII. <i>General Average and Salvage</i>	33
IX. <i>Abandonment</i>	35
X. <i>Fraud</i>	39
XI. <i>Sea Worthiness</i>	46
XII. <i>Illegal voyages</i>	47
XIII. <i>Prohibited goods</i>	51
XIV. <i>Wager policies</i>	52
XV. <i>Changing the Ship</i>	57
XVI. <i>Deviation</i>	ib.
XVII. <i>Warranty</i>	67
XVIII. <i>Return of premium</i>	80
XIX. <i>Reassurances and double assurances</i>	86
XX. <i>Insurances upon lives</i>	88
XXI. <i>from fire.</i>	90



A N
E S S A Y
O N T H E
L A W O F B I L L S O F E X C H A N G E
A N D
P R O M I S S O R Y N O T E S.

I N T R O D U C T I O N.

THE law respecting bills of exchange and promissory notes, has been the subject of very considerable discussion, and furnished materials for several valuable publications. Mr. Chitty's treatise, which is the most recent in point of date, accords most nearly in its plan with the essay which I propose submitting to the public.

Pothier has an excellent treatise upon the subject, and the laws of England and France in many respects coincide, though in many others there is a material difference; the positive regulations in the French law being more complex and minute than those with which we are acquainted in England.

It seems to be universally agreed that there are no traces of any analogous institution in the civil law; and the origin of these instruments has been the subject of some discussion, but there is nothing in the result more satisfactory than that they were gradually adopted, and reduced into a system to meet the exigencies of an extended commerce. The assistance which they afford to commerce, when pursued according to their original nature and design, is sufficiently manifest. Modern times have also seriously felt the inconvenience of their abuse in establishing a fallacious credit.

Foreign bills of exchange, drawn by the creditor in one kingdom, upon his debtor in another, were familiar to the English courts much sooner than inland bills, drawn by one person upon another, both residing in this kingdom. The latter became customary about the time of Charles the second, and negotiable promissory notes seem to be of still later origin. Two statutes have placed inland bills and promissory notes nearly upon the footing of foreign bills, adopting in respect of the former, the custom of merchants concerning the latter. These instruments are distinguished from mere personal contracts, by the peculiar quality of creating an obligation, which is the object of a direct regular transfer.

In tracing the law upon this subject, I shall, in the first place, examine the nature and properties of a bill of exchange payable to order; incorporating such decisions respecting promissory notes,

INTRODUCTION.

3

Or other instruments, as are founded upon common principles, and refer to any peculiar distinctions either in the progress of that examination, or in distinct paragraphs, as may appear most conducive to an accurate discussion.

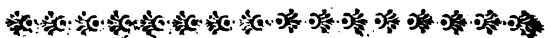
There are special regulations respecting bills and notes under five pounds; these will be stated separately, and without interrupting the regular progress of the enquiry.

In respect to the persons who may be parties to such instruments, there is no distinction from the regular law of contracts; they are subject to the common exceptions of infancy and coverture; they may be drawn, indorsed, or accepted, either personally, or by the intervention of an agent duly authorized, and the act of a partner will be obligatory on his associates. The authority of an agent may be general, and in case it is recognized and avowed as such, it cannot be circumscribed so as to affect the interest of third persons by any private communications. The acts of such an agent also continue obligatory, notwithstanding any revocation of his authority, provided such revocation is not sufficiently divulged.

There may be also a special authority in respect of a particular bill; and that is no further obligatory than as it is regularly pursued; therefore, when it appeared, that a person had specially employed another to raise money upon a bill of exchange, with particular directions not to indorse it

the majority of the court of King's Bench were of opinion that an engagement made by him, was not obligatory upon the person employing him; but in the course of further enquiry it appeared, that there was no such prohibition, and then it was adjudged, that the general authority to raise money on the bill, and without any restraint as to the mode of doing it, comprized a power to do it, as might be found necessary—*Tenn. v. Harrison*, 3 T. R. 757—4 T. R. 117. The signing or indorsing a blank note or bill, is an authority to fill it up with an indefinite sum, so far as regards the right of a third person who may give credit to it—*Ruffel v. Langstaffe*, Doug. 514.

The act of one partner in the name of the firm, is allowed to be obligatory on the others, though it may be on his own separate account, unless the parties claiming the benefit of it, received it with knowledge of that circumstance, in which case the others are not bound—*Vi. Shireff v. Wilks*, East, 48. But after the dissolution of a partnership, one of the partners cannot bind the others by his signature to a bill, although he is empowered to receive and pay the debts of the concern, and actually applies the money, which he receives upon discounting the bill, in the discharge of a partnership debt—*Kilgour v. Finlayson*, 1 H. Bl. 155.



CHAP. I.

Of the general Nature and Requisites of a Bill of Exchange.

A BILL of exchange is commonly drawn by one person upon another, directing him to pay a sum of money to a third, or his order; the first person is called the drawer, the second the drawee; and after he has acceded to the order, and undertaken for the payment of it, the acceptor; the person in whose favour it is drawn, is called the payee; and the payee, or any other person, giving a further credit to the bill by his signature, is called the indorser; such signature being usually, but not necessarily, on the back (*indorso*) of the instrument. A person may also become a party to a bill by accepting it for the honour of the drawer, or any of the indorsers; the person entitled to receive payment is generally referred to by the name of the *holder*.

It is essential to a bill of exchange that it shall be for the payment of money, and for that only. Any additional direction, as to deliver goods, destroys the special character, and reduces it to an ordinary contract.

Another essential circumstance is, that the money be payable at all events, and not dependant upon any condition, as the sale of an estate, mar-

riage, the arrival of a ship; but the time of payment need not be precisely ascertained, provided it depends upon an event which necessarily must happen, as the death of any person.—*Cook v. Colehan*, Str. 1287. A bill, payable to a person when he came of age, to wit, on the day of was ruled to be an engagement for the absolute payment on that day; and the coming of age was regarded as a collateral reference, so that the money would have been due, notwithstanding the person had died in the intermediate time.—*Goss v. Nelson*, Bur. 226. And I have been engaged in a cause, in which it was held by a very eminent judge, that a promissory note to pay on a person's coming of age was a negotiable instrument, and that notwithstanding no day was specified, the engagement was absolute, and would not be defeated by an intermediate death,

an engagement to pay G. P. or order 8l. upon receipt of his wages or prize money, was a negotiable promissory note, but such a decision never can be supported. The engagement depended not merely on a public act of paying of a ship; but upon the wages being received by the drawer, which is certainly conditional. The reporter does not positively state the decision to have taken place.—*Evans v. Underwood*, 1 Wils. 226. Mr. Kyd takes notice of these cases being upon notes, and not upon bills; but I conceive that cannot make any difference; and since his publication it has been expressly held, that promissory notes and bills of exchange, stand exactly upon the same footing in every respect.—*Carlos v. Fancourt*, 5 T. R. 484.

It is also necessary that the direction for payment shall be general, and not dependant upon a particular fund; but a mere reference to such fund as a matter of account between the drawer and the drawee, and without affecting the right of the holder, is immaterial. Whether a fund is mentioned, as limiting the claim of the holder, or only as directing the application of the payment between the other parties, is a question of construction, with respect to which, every case rests upon its own foundation.

It has been truly stated by Lord Kenyon, that it would perplex the commercial transactions of mankind if paper securities of this kind were issued out into the world, encumbered with condi-

OF THE GENERAL NATURE & REQUISITES

tions and contingencies, and if the persons, to whom they were offered in negotiation, were obliged to enquire when these uncertain events would probably be reduced to a certainty.—5. T. R. 485.

But though engagements, which are conditional or referable to a particular fund, or comprize other objects than the payment of money, have not the special character belonging to bills of exchange or negotiable notes, they may be valid, as ordinary contracts between the immediate parties; but for that purpose a sufficient consideration must appear, and be expressly alledged, whereas in respect to the negotiable instruments, a consideration is presumed as between the original parties, and as to derivative holders is immaterial, as will be observed more particularly in the sequel.

There are various stamp duties imposed upon bills and notes, and a proper stamp is essential to the instrument. It is not sufficient that it should have a stamp of the proper value or more, unless it is also of the proper denomination, a circumstance which is apparently hard and injudicious.

If there is however a stamp of equal or superior value, the proper stamp may be affixed upon payment of 40s. before the instrument is due, and 10s. afterwards. If there is not originally a stamp amounting to the requisite value, the omission can never be legally supplied, in which respect these instruments differ from deeds and other writings, which may be stamped at any time upon paying a

penalty of 10*l*. Where the commissioners had actually affixed the stamp, it was held, that no objection could be taken, as it would be injurious to credit, if it were necessary for an indorsee to ascertain before he takes a bill whether it was stamped or not, previous to its being made.—Peake, 173.

If a bill is made with a proper stamp, and is afterwards altered by the consent of the parties, though before the negotiation, a new stamp is necessary, as it is a different contract—Bowman *v*. Nichol, 5 T. R. 537.

A practice was introduced, which prevailed for a considerable time, of dating bills drawn in England at Hamburgh, or some other foreign place, with a view to evade the payment of the stamp duty, and upon the validity of such bills coming in question before the court of King's Bench, it was contended, that the drawer, who had given currency to them as foreign bills, was elopped from alledging their insufficiency; but the court decided, that the want of a proper stamp upon bills actually drawn in England, was an insuperable objection, even to the claim of a fair holder, and certainly any other determination would have been very conducive to frauds on the revenue.—Jordan *v*. Lashbrooke, 7. T. R. 601.

If a bill or note is made in a foreign country, it must be conformable to the laws of that country, in order to be of any avail in this. The laws of Jamaica impose a stamp duty on promissory notes, and a note containing a promise to a sailor for the

OF THE GENERAL NATURE & REQUISITES.

payment of his wages, on performance of a voyage, was adjudged to be void for want of such a stamp.—*Alves v. Hodlon*, 7 T. R. 123. Independent of the deference which is due to the authority of that case, it might be reasonably supposed, that although a promissory note might, in respect of its etymology be originally defined as a note containing a promise: the term is now technically appropriated to a mercantile engagement of a special character, and that the act imposing the duty should be construed as referring to those well-known instruments, and not as affecting the promises, which are part of an ordinary contract for labour and wages.

A bill or note may be made payable upon demand or at sight*, at a certain period after sight, or at a certain period after date, the time is computed from its being accepted or protested for non-acceptance (*Campbell v. French*, 6 T. R. 200.) as on account of the drawee not being found according to the address: or I conceive that in case of an inland bill, notice without protest is sufficient.

If a bill is made payable a certain number of days after date, the day of the date is not included in the computation; therefore a bill dated on the

* In respect of the stamp duties it has been held, that an exception from the stamp duty upon bills payable on demand, was not applicable to those payable at sight: it is also questionable, whether days of grace are not allowed upon bills payable at sight.—*D'V. Anson v. Thomas Bailey*, 24, and the prevailing opinion seems to be in favour of that supposition: upon bills payable on demand, they certainly are not allowed.

31st of May at ten days after date, becomes due on the day of grace after the eleventh. If the bill is payable a certain number of months after date, the computation is by calendar months, (contrary to the general rule of construction in other cases) and is not extended into any month beyond the number specified, notwithstanding any inequality of length. Therefore a bill payable in a month after the 31st of January, becomes due on the last day of February, subject to the days of grace, which will be particularly mentioned in a future paragraph.

When a bill is drawn in a country using the new style upon another using the old, or *vice versa*, the question arises, whether the date must be computed according to the usage of the country where the bill is drawn, or that where it is payable. I think the stronger argument is in favour of the former, because the date on the bill is generally that of the day on which it is made. And the strong presumption in this respect is, that a person intends to refer to the computation of the country where he resides, and which is familiar to his general habits. If no time is mentioned, a bill is payable on demand. Foreign bills are often drawn with a reference to certain periods after the date, called *usances*, and which are established between one commercial place and another, by common usage and consent, which commonly amount to one, two, or three calendar months. Bills may be drawn at *usance*, double *usance*, treble *usance*, half *usance*, &c.

Ev.

C 2

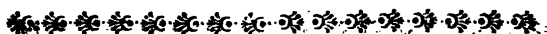
Where the usance is a calendar month, the half usance is fifteen days, whether the bill is drawn in February or March.

It is customary in a bill or note, to express that it is given for value received, and in France such value must be particularly specified. In England these words are not material, so far as concerns the general validity of the bill, but are essentially necessary in order to obtain the benefit of the statutes giving interest, damages, and costs.

It is usual to mention whether the bill is to be paid as by advice from the drawer, or without further advice; but the giving or withholding advice cannot affect the interest of the holder.

To obviate the dangers of navigation, foreign bills are commonly drawn in sets: inland bills are also sometimes, but rarely, drawn in this mode. The drawee is directed to pay this first bill of exchange, the second and third not paid, and so *mutatis mutandis*, with the others; but if the first wants this condition, and it is only contained in the second or third, it is no defence to an action on the first, that the second has been paid. In other words, a bill not conditional on the face of it, shall not be rendered so by what is contained in any other writing; but if there evidently appears to be a casual omission, as in stating the words second and fourth not paid, the payment of the third may be a sufficient discharge—Vi. Bailey.

The place where a bill is to be paid ought certainly to be mentioned; and it is said, that if the payee lives at one place, and the payment is to be made at another, both must be specified, but I conceive that these circumstances do not affect the validity of the instrument, however requisite they may be in point of convenience.



CHAP. II.

Of the Transfer of Bills of Exchange.

THE bill being drawn payable to order, the payee may either retain it and receive payment himself, or may negotiate it by indorsement; and this, though it is made payable not to A. B. or order, but to the order of A. B. his making an order not being in any case an essential requisite: such an indorsement may be either in blank, by merely putting a signature on the back of the bill, which transfers the interest to the holder generally, or there may be a special indorsement, directing the contents to be paid to I. S. or to the order of I. S.

It was once supposed, that if an indorsement was made specially to a person by name, without adding to his order, it was restrictive, and that he could not by further indorsement, transfer his right against the preceding parties; but the point was decided otherwise recently after Lord Mans-

field's appointment as Chief Justice. A jury of merchants found a verdict, recognizing it as a custom, that such an indorsement was restrictive; but the court of King's Bench were of opinion, that it was a question of law, and that the contrary proposition had been fully settled.—*Edie v. E.* I. Comp. 2 Bur. 1216. An indorsement may however be framed so specially as to be restrictive of any further negotiation, for instance by a special direction to pay to C. B. only. Therefore where the payee made an indorsement that the amount must be credited (by the drawees) to the account of a particular person, and the bill was remitted to the drawees, and by them credited accordingly; after a forged indorsement, in the name of the person to whom credit was to be given, and payment for the honour of the drawer, it was decided that the drawer might maintain an action for a return of the money, the majority of the King's Bench being of opinion that there was only a direction to give credit, and not an indorsement to the person on whose behalf that credit was to be given.—*Ancher v. Bank of England*, Doug. 637.

The bill after it has been indorsed by the payee, may be further indorsed from hand to hand through any number of persons, the ultimate holder having the engagement of all the preceding parties in his favour. Such indorsements, like that of the original payee, may be general or special, and a special indorsement will only bind the party making it, according to its purport and

effect. If all the indorsements are special, the right of a holder is limited by their particular directions, but an indorsement made in blank, gives a right to any holder into whose hands the bill may afterwards regularly come, whether by delivery or otherwise; and it has been decided by Lord Kenyon, at *nisi prius*, that notwithstanding a subsequent special indorsement, the holder may maintain his action against the drawer, and all preceding indorsers, or against the acceptor, for he may consider the payee, or any subsequent general indorser, as having indorsed the bill to himself, and strike out the special indorsement*.—*Smith v. Clarke, Peake*, 225.

If a bill is casually lost, the person who finds it derives no right against the real owner, and an action may be maintained against him for detaining it, or converting it to his own use; but a person who receives a bill lost or stolen, without notice of the fact, and for a valuable consideration, has all the rights which belong to any other holder; and this rule, though attended sometimes with apparent hardship, is founded upon the strongest principles of justice and convenience, for these

* Special indorsements are often used as a guard against robbery, but they will be very insufficient in this respect, if they have no other effect than that of limiting the personal responsibility of the indorser. It would certainly be more agreeable to the intention of the parties to consider them as restrictive. Perhaps, as taking such a bill without the signature of the person to whom it is specially indorsed, is out of the ordinary course of business, it may be deemed sufficient to affect the party taking it, with notice of its being stolen or lost.

instruments derive much of their benefit from the currency which attaches to them; any name of established credit being a sufficient inducement to receive them in the course of business, whereas the confidence, which is the basis of their general circulation, would be destroyed, if the holders were subject to a series of collateral enquiries, and bound in every case at their peril, to trace the history of the bill from its being issued to the time of its being tendered in payment.

A person may draw a bill payable to his order, which must be indorsed by himself to give it circulation. Two persons, not connected in partnership, having drawn a bill payable *to our order*, it was the opinion of the court of King's Bench, that they were to be considered as partners in that transaction, and that an indorsement by one was sufficient. It afterwards appeared to be the universal course of trade in such case, for the bill to be indorsed by both persons, and thereupon the indorsement by one was allowed to be insufficient—*Carvick v. Vickery*, Doug. 653.

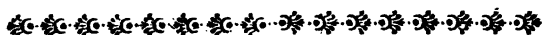
The indorsement of the payee is essentially necessary to confer a right to any subsequent holder against the drawer or acceptor, for it is only to that person, or his order, that they have undertaken to pay the amount; and therefore if the signature of the payee is forged, though by another person of the same name, no title is conferred; and this notwithstanding the payee is not specially described, and the acceptance is after the

Bill appears to be endorsed—*Mead v. Young*, 4 T. R. 28. The actual proof of this indorsement (being a necessary part of the holder's right against the acceptor,) cannot be dispensed with, notwithstanding any difficulty and inconvenience which may arise from the circumstance of the indorser being unknown to the holder—*Smith v. Chester*, 1 T. R. 654.

But every indorser is, in respect to his indorsee, an original drawer, and is liable to similar obligations as if he had actually drawn the bill in their favour, whatever his own right may be; whatever observations therefore are made in the sequel respecting the obligation of a drawer, will, in general, be equally applicable to the case of an indorser..

A bill cannot be indorsed over for part, at least so as to bind any of the preceding parties; for a man cannot apportion such personal contracts, and make another liable to two actions, where by the contract he is only liable to one. In an action against the drawer by an indorsee, for part, it was alledged, that by the custom of merchants a drawer is liable upon such partial indorsement. But in answer to the argument founded upon that allegation, Lord Chief Justice Holt said, "That this is not a particular local custom, but the common custom of merchants, of which the law takes notice, (*Hawkins v. Lord Raym.* 360;) but a subsequent acceptance would be binding, and where the drawer of a bill has paid part, it

may be intorsed over for the residue—Beawes 226.
Chitty 120.



CHAP. III.

Of the Acceptance of Bills of Exchange.

THE acceptance of a bill is an undertaking to pay it when it becomes due.

This is regularly to be made by the person upon whom it is drawn, and may by either verbal or in writing—where a bill is made payable at a certain period after sight, a presentment for acceptance is essentially necessary, for it is only from such acceptance that the time is to be computed.

An acceptance may be made either before the bill is issued or after, or even after it has become due, and in the latter case is an engagement to pay upon demand.

If a bill is only accepted verbally, and is not afterwards duly paid, the drawer, in case of non-payment, is only liable to answer for the principal sum, and not for damages and interest. Such at least Mr. Kyd argues, with considerable effect, to be the meaning of some very obscure expressions in the statute upon that subject.

There is no particular form of words necessary for an acceptance, whether verbal or written: any expression which testifies an assent to the payment

is sufficient. There are several cases respecting this subject, but they principally turn upon questions of construction and whether the expressions which are used do, or do not, constitute an actual engagement, must in every case depend upon the intention as collected from all the circumstances.

In general if the drawee returns the bill, having written any thing upon it, as—the day on which it will become due—it is an acceptance, unless explained by other circumstances. A drawee kept a bill for some days without objection, and whilst he had it in his possession made an entry of it in his bill-book, under a particular number, and wrote upon the bill the same number, with the day on which it would become due, and afterwards sent it back, refusing to accept it. It was proved, that it was his common practice to enter all his bills in this manner whether he intended to accept them or not; the court seemed to think, says the reporter, that these circumstances alone did not amount an acceptance, for which there is no authority, the other circumstances certainly would not; the case would not acquire any additional weight from the drawer's habit of business. The entry could, at the utmost, only amount to presumptive evidence of an agreement to accept, and that presumption would be destroyed by returning the bill with a positive refusal.

If a person accepts a bill which is actually shewn to him, he is answerable, although the name of

Ev.

D 2

the drawer is forged, his engagement relating to that individual writing: but if without seeing the instrument, he engages to pay a bill of a certain tenor, drawn by a particular person, the engagement is only referable to a bill actually drawn by the person who was mentioned, and not to any forgery in his name.

An acceptance may be for the whole sum for which the bill is drawn, or part of it, or it may be for an extended time, or upon a certain condition, as the consignment of a cargo, the receipt of a sum of money. A person on whom a bill was drawn, having at the same time a navy bill transmitted for security, upon which the holder tendering the bill for acceptance had a lien, kept the navy bill, saying, that the other would not be accepted till that was paid. This was held to be a conditional acceptance, which became absolute upon the navy bill being paid—*Pierson v. Dunlop*, Cowp. 571.

Whether there has been an absolute or conditional acceptance, or the extent of a condition, is (as was before observed concerning acceptance generally) a question of construction, always depending upon the particular circumstances of the immediate case, but whether an acceptance is absolute or conditional, is for the decision of the court, and not the jury—Per Buller, 1 T. R. 186. Also, a general written acceptance cannot be qualified by a verbal condition, which is only the ap-

plication of a common rule, respecting all written instruments whatever.

A person giving a partial acceptance, is bound by such acceptance, provided it is agreed to by the holder of the bill; but if the holder dissents from what is offered, as by protesting the bill for nonacceptance, it is a waiver of the proposed engagement, and no obligation rests upon the drawee. —1 T. R. 182.

An agreement to accept may be obligatory upon the person making it. This was decided in a case which underwent considerable discussion. White desired leave to draw upon Pillans and Rose, proposing to give them credit upon Van Mierop. Pillans and Rose acceded to the request, and after they had accepted the bill of White, applied to Van Mierop, who agreed to honor their bill; but afterwards, upon the failure of White, retracted that consent before any bill was drawn. And the court of King's Bench decided, that the agreement was obligatory. Some doctrines were advanced in that case, which are extremely disputable, but the true substantial ground of decision seems to be, that the agreement of Van Mierop to accept, prevented Pillans and Rose from calling upon White, and that the agreement to accept was equivalent to an acceptance—Pillans v. Van Mierop, 3 Bur. 1663. Lord Mansfield in a subsequent case, laid it down, that if one man to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person,

bill was only accepted by him as servant to the company, as it imported upon the face of it to be drawn upon himself, and the addition of Cashier to his name, was only to denote his person more certainly, and the direction to whose account he was to place the money was only for his own use. It was said, that it might have been otherwise had the action been by the payee, who was privy to the transaction, and if it appeared that he tendered the bill as a bill on the company—*Thomas v. Bishop*, Str. 955—1 B. R. H. 1.



CHAP. IV.

Of Acceptance and Payment for the Honour of the Drawer and Indorsers.

THE engagements of the drawer, the indorsers, and the drawee, who has taken upon himself the character of acceptor, fall within the regular and ordinary course of negotiation: another engagement may arise by an acceptance for the honour of the drawer, or any of the indorsers, in case the drawee cannot be found or refuse to accept. The holder of a bill, who cannot obtain acceptance in a regular course, has an immediate right of action against the drawer, and all or any of the indorsers, and in the exercise of that right may subject them to considerable expence. It is therefore manifestly for their interest that any person on their behalf should engage for the regular payment

of the bill, and that the holder being satisfied with such engagement should desist from his pursuit. Therefore it is competent for any body to make such an acceptance, and charge the person for whose honor he accepts, or any of the antecedent parties, with the amount which he consequently pays; and he thereby imposes no greater obligation upon them than they were already liable to on behalf of any holder; but an acceptance for the honour of the drawer, or any of the prior indorsers, does not give him a claim against any subsequent indorser. His acceptance is a security to all who are interested, that the engagement of the party on whose behalf it is made, shall be duly performed; and it would be contrary to the nature and object of the transaction that the acceptor should have a claim upon a person to whom he has rendered himself liable for the same demand.

This is an instance of the implied or *quasi* contract of *negotiorum gestio*, the nature of which is discussed in an Essay on Mandates, which will be shortly presented to the public. It is founded upon one person's undertaking without the authority of another to act on his behalf, and imposes an engagement of indemnity on his person whose business is undertaken upon either of those two conditions. 1st. If he should ratify the act by his subsequent assent. 2d. If the nature of the business should be indispensable, and such as the principal would necessarily have undertaken if he had had an opportunity. The present case is with a slight variation of expression, an instance of the

second condition, for it is to be presumed, that every man would assent to another's becoming a surety on his behalf, in order to prevent the inconveniences which might otherwise fall upon himself.

I do not find that there are any traces of this subject, having directly come into discussion in our courts, but the existence of such a collateral engagement is a matter of perfect familiarity. I apprehend that some mistakes have become prevalent respecting it,

It is stated by Beawes, and several writers who have adopted his observations as authority, that in order to induce the regular effects of such an acceptance, there must previously be a protest for nonacceptance by the payee: from which notion this special acceptance is commonly termed an acceptance *supra protest*.

It seems to me that whoever first stated this maxim as part of English jurisprudence, fell into the error of adopting as a general principle of mercantile law, an institution founded upon the positive laws of other countries.

According to the law of France, a protest was essentially necessary to enable the holder to maintain his action against the drawer; and the observation of Pothier places the necessity of a protest with regard to the matter at present under consideration, in its true point of view. He says, "Whoever discharges a bill of exchange for the

honour of the drawer, or any of the indorsers, in order to subject them to an action *negotiorum gestarum*, must let it be protested by the bearer. The reason is, that as the drawer and indorsers only become debtors upon the bill in consequence of a protest, it is necessary that such a protest should be made before he can alledge that he has acquitted them from *that debt*, and consequently before he can be entitled to maintain the action *negotiorum gestorum*, against them. "*Celui qui acquitte une lettre de change pour l'honneur du tireur ou de quelqu'un des endosseurs doit pour obliger envers lui actione negotiorum gestorum celui pour l'honneur de qui il l'acquitte la laisser protester par le porteur avant que de la payer. Elem. Jur. camb. Hein. La raison est que le tireur et les endosseurs ne devenant debiteurs de la lettre que par le protest qui en est fait, il faut qu'il est etc fait pour que celui qui l'a payee puisse pretendre les EN avoir acquittes, et avoir en consequence contre eux l'action negotiorum gestorum.*"

It is well known, as we will presently have occasion to observe, that a protest of an inland bill is not necessary except with regard to damages and interest; therefore the reason of the foreign laws is not applicable, and there is no positive law upon the subject; but in case of foreign bills of exchange, the protest forms an essential part of the custom of merchants, and to these the law which has been stated generally may be correctly ap-

plied. Mr. Chitty states what has been said upon the subject with some reserve.

In case of an inland bill it seems reasonable to state, that an acceptor upon honour, is bound, in order to maintain his action for an indemnity, to give immediate notice to the person on whose behalf he engages, and that such notice is sufficient.

Pothier states that the drawer or indorser is entitled to the same delays, (for which we may substitute the more extensive term *objections*) in the action brought by the person accepting for his honour, as upon an action in chief; otherwise, the person whose business is undertaken, would be in a worse condition than if it had not been so undertaken, which the nature of the implied contract of *negotiorum gestorum* does not admit.

Not only a stranger, but the drawee, may accept a bill for the honour of the drawer or any of the indorsers. The difference between such a partial and a general acceptance, is, that in the latter case he renders himself primarily liable, and the general acceptance is presumptive evidence of his possessing sufficient effects, whereas by accepting specially, though liable to the demands of the holder, as if the acceptance were general, he only engages as a surety for the person on whose behalf he comes forward, and is entitled to an indemnity from that person, or any of the antecedent parties.

It may perhaps be convenient to depart a little

from the regular arrangement of our general subject, in order to dismiss at once the observations respecting the payment of bills accepted (as it is called) *supra protest*, and also the payment upon a similar principle, of bills not duly paid by the drawee, whether accepted or not.

It is said by Beawes, in addition to the observation which has been already discussed, that unless the drawer or other person, for whose honour an acceptance is made, signifies his approbation, the acceptor on his behalf must cause a formal protest for nonpayment to be made before he pays the money. This observation, like the preceding, seems to have been originally founded on the supposition that a protest was necessary, in order to charge in chief the person for whose honour the engagement is made, and if the argument already submitted, respecting a protest for nonacceptance, is correct, a protest for nonpayment in the case of inland bills is equally unnecessary.

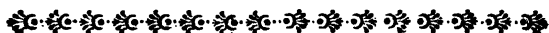
When a bill is not duly paid by the drawee or acceptor, any other person may pay it for the honour of the drawer or indorsers. And this, it is said, must be preceded by a regular protest for nonpayment, but this kind of payment is founded upon the same principles, and subject to the same observations, with an acceptance which has just been considered; whatever therefore is the true conclusion, in respect of the one, is equally applicable to the other. A drawee, who has accepted generally, cannot afterwards pay under protest

for the honour of the indorser, or, as I conceive of the drawer. He has already subjected himself to an obligation in their favour, which he cannot, by his own act, dissolve or qualify.

Beawes further observes, that the possessor of a bill protested for nonpayment, is not bound to admit of its discharge from a third person under protest, either in honour of the drawer or of any indorser, unless he declare and prove that the honour of that bill was particularly recommended to him; and adds, that if the protested bill be indorsed by the possessor's correspondent, and was remitted by him, then the possessor ought not to admit of any payment in honour of the indorsements, but under the express condition that the payee shall have no redress against the said correspondent.

The latter part of this sentence seems to comprise the true meaning of the whole, and the first part must be understood with reference to it. Certainly the holder of a bill is not bound to substitute to a stranger a right which he does not intend to prosecute himself, and ought not to give a right of action, which he cannot maintain on his own account, and the term *correspondent* must mean, if any thing, the principal, for whom the holder is merely an agent, and not any person indiscriminately, who may have remitted the bill in a course of payment. But if payment is tendered to the holder on behalf of the first indorser, though without his direction, justice clearly requires that he should be permitted to

avow that tender, and oppose it to any action which may be afterwards brought. I think also, that a tender by the first indorser, may be pleaded by any subsequent indorser, and that the tender of any agent of that indorser, and consequently of any friend interposing on his behalf, would be sufficient evidence to support the allegation.



CHAP. V.

Of the Time when a Bill is Payable.

WHERE a bill is expressed to be payable at a certain period, whether after date or after sight, a certain additional time is allowed by the usage of all commercial countries, called days of grace, which probably were originally allowed as an indulgence, but are now ingrafted into the contract as a matter of right; these vary in different places, but in England the time is three days, so that a bill drawn on the 1st, payable ten days after date, becomes due upon the 14th; but if the third day is a Sunday, or a day of public rest, the bill is due on the day preceding. The only days of rest which are generally recognized in England, except Sunday, are Christmas-day and Good Friday*. To these may possibly be added days appointed by

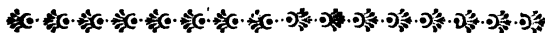
* By a statute, 40 G. III. it is expressly enacted, that this shall be the case as to Good Friday, but the law was generally considered to be so before.

proclamation for a public fast or thanksgiving. We do not find it any where stated what would be the rule if the third day should fall on Sunday the 26th of December, whether on account of Christmas-day falling on the Saturday, only one day of grace would be allowed; and the bill become payable on the Friday, or whether four days would be allowed, and the time be extended to Monday.

This additional period is not allowed in respect of bills payable upon demand. I have already stated it as a subject of doubt, whether it is allowed upon those payable at *sight*.

In a case which was decided upon a different ground, it became incidentally a subject of discussion whether the engagement was discharged by payment of the bill at any time before the last moment of the day on which it became due. Lord Kenyon was strongly of the opinion that it was, as being within the general rule of law, that a party bound to do an act on a given day has till the last moment of the day for the purpose. Mr. Justice Buller as strenuously supported the opposite opinion; he said it had been correctly stated by counsel; that the nature of the acceptor's undertaking was to pay the bill on demand on any part of the third day of grace, and that the rule was so well established that it would be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made *on* the last day of grace which supposes a default in payment, for a protest

cannot exist unless default be made. But if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day; therefore the usage on bills of exchange is established: they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour; but on the other hand, to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences. The other judges declined expressing any opinion upon this point, it being unnecessary to the decision of the case before them.—*Lestly v. Mills*, 4 T. R. 170. It had been previously decided, that a person committed an act of bankruptcy by denying himself to the holder of a bill of exchange on the morning of the day when it became due. This was adduced as an argument in support of the position adopted by Mr. Justice Btiller, and the inference was certainly just.



CHAP. VI.

Of the general Obligations of the several Parties;

THE regular obligation of the acceptor is confined to the payment of the bill when it becomes due; upon this point it will not be necessary to enlarge.

The obligation of the drawer and indorsers, is not only for the payment but also for the due acceptance of the bill.

I conceive the holder may in all cases insist upon the acceptance being in writing, which is essentially necessary to give it the full benefit of circulation; and that the statutes which seem to require such written acceptance only in cases of inland bills for *value received payable after date*, are no further material than in respect of the cumulative remedy for damages and interest.

Mr. Chitty observes, that it may be doubtful whether the holder is in any case bound to acquiesce in an acceptance by an agent, as it multiplies the proof which he will be obliged to adduce in case of an action. It is usual to leave a bill for twenty-four hours that the drawee may examine his accounts, and determine whether he will accept or not, but this seems to be rather a matter of general courtesy than of absolute right. Indeed it is impossible that the law can, in any case, oblige a man to part with the possession of his security.

It is usually stated to be one of the engagements of the drawer, (which of course extends to the indorsers) that the drawee is to be found at the place of which he is described to be, if that description be mentioned in the bill; and Mr. Chitty has the same expression: but in another passage he says, that if the drawee of a bill cannot be found

at the place where the bill states him to reside, and it appears that he never lived there, or has absconded, the bill is to be considered as dishonoured: but if he has only removed, it is incumbent on the holder to endeavour to find out to what place he is removed, and to make the presentment there; and he should in all cases make every possible enquiry after the drawee, and if it be in his power, present the bill to him. I cannot think that this doctrine is correct, and that the holder of a bill who takes it under the confidence that it will be accepted at a certain place, which is expressly pointed out to him, should be burthened with a train of collateral enquiries. The place upon which a bill is drawn is often of very considerable importance. And in England, London, as the general centre of business, is constantly preferred to any other place. It would be very unsatisfactory if a person receiving a bill payable upon the face of it in Cheap-side, should be subject to a troublesome examination, the result of which might be that he had to send it for acceptance to Berwick, or the Land's End. This doctrine is also directly repugnant to the purpose for which bills of exchange were originally introduced, the discharge of a sum of money at a particular place. If the drawee has publicly and notoriously removed to another place in the same town, it may be deemed a fair exception to these general observations.

There is a *nisi prius* case reported to have been
Ev. F 2

decided by Lord Chief Justice Lee, wherein the proof that the drawer of a promissory note had shut up his house, was held to be insufficient, for that the plaintiff ought to shew that he had enquired after the drawer, and endeavoured to find him out.—*Collins v. Butler*, Str. 1187. But great as the authority of Lord Chief Justice Lee assuredly is, a hasty decision at *nisi prius** can never be the adequate foundation for a general rule contrary to every principle of analogy and convenience. Mr. Chitty adds, on the authority of Molloy and Pothier, that if on presentment it appears that the drawee is dead, the holder should enquire after his personal representative, and if he lives within a reasonable distance, should present the bill to him. If the drawee is dead, subsequent to the drawing of the bill, that may be a good excuse to the drawer, upon the common principle that the thing stipulated for has become impossible by the act of God; but in such case, the true course seems to be to give immediate notice, in order that the drawer may remit a proper sum for payment. I do not think that the representatives can be properly required to accept, for they are not bound to enter into a personal obligation, and cannot by any acceptance affect the property of the deceased.

* It does not appear that in this case any place of payment was designated; but supposing there not to be any, it would seem reasonable that an enquiry at the drawer's last known place of residence should be sufficient to throw the charge on the indorser.

The passage alluded to in Pothier is, that if the relations alledge that they are taking the time allowed by law, for deciding whether they shall accept the succession, or if there is no widow or presumptive heir at the place, the holder is bound to make a protest at the house of the deceased.

In an anonymous case at *nisi prius*, before Lord Ch. Jus. Treby, reported by Lord Raym. vol. 1, p. 743, it is said to be the custom of merchants, that if a person upon whom a bill is drawn, absconds before the day of payment, the man to whom it is payable, may protest it, to have better security for the payment, and give notice to the drawer of the absconding of the person on whom it is drawn, and after the time of payment is incurred, then it ought to be protested for nonpayment the same day of payment or after it; but no protest for nonpayment can be before the day that it is payable; proved by merchants at Guildhall. And the plaintiff was nonsuited because he had declared upon a custom to protest for nonpayment before the day of payment. This is a very loose note, but was lately quoted by Lord Kenyon in support of the position, that a bill payable at so many days sight, is to be accounted so many days after the bill shall be accepted, or else protested for non-acceptance.—6. T. R. 212. It may be inferred, but not absolutely, that in the case to which the custom is supposed to refer, the bill had not been regularly accepted. At that period the law respecting inland bills was in its infancy, and had by

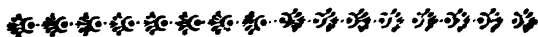
no means obtained the character of a regular system. It is now clearly settled, that if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer (or any of the indorsers) although the time of payment is not come. The reason assigned by Lord Mansfield in determining that point, was, that what the drawer had undertaken had not been performed, the drawee not having given him the credit, which was the ground of the contract.—*Milford v. Mayor*, Doug. 55.

In a case, preceding that before Lord Mansfield, it was held, that the drawer of a bill contracted a debt the very instant when he drew it; and that the nonacceptance or protest, did not raise any debt, but was only notice to the holder that the drawee could not pay the same; consequently that the debt was proveable upon an intervening bankruptcy, and barred by the certificate.—*Macarty v. Barrow*, Str. 994.—3 Wils. 17.

There are references in the treatises on this subject to a protest for better security, if an *acceptor* become insolvent, or is publicly reported to have failed in his credit, or absents himself from the change before the bill is payable. I cannot however discover any instances of our courts judicially acting upon such a case, by compelling the drawer to give a better security for the payment, which is the obligation supposed to arise.

The undertaking that a bill shall be accepted up-

on presentment to the person on whom it is drawn; and paid when it becomes due, can be easily understood; but what shall be deemed giving better security, or how the giving it can be judicially enforced, are enquiries to which it will be easy to give a definite answer. The probability seems to be that our writers have copied what has been said upon these subjects by the jurists of other countries, which have judges appointed to decide summarily on commercial subjects with considerable latitude of discretion. It appears, that according to the laws of France, the drawee might be admitted to give security for payment if acceptance was refused: so that there protests for *nonacceptance* were in effect protests for better security, whereas we have seen, that in England the amount of the bill becomes an absolute debt immediately upon nonacceptance. Upon the whole I do not think that a protest for better security constitutes any part of the English law.



CHAP. VII.

Of Interest, Costs and Damages, and herein of Exchange and Re-exchange.

IN case a bill is not regularly paid, the holder has in certain cases a right to recover not only the principal money expressed in the bill, but also interest, costs, and damages.

This right in case of foreign bills, is general.

In respect to inland bills, it is founded on the respective statutes of 9 and 10 William III. c. 17, and 3 and 4 Anne, c. 9, and confined to such as are expressed to be made for value received, and which are made payable at certain periods *after date*, and are drawn for 5l. and upwards.

The nature of protests will be more fully discussed in a subsequent chapter, but it may be here generally mentioned, that they are in all cases necessary with respect to foreign bills, but in the case of inland bills are only material for the purpose of enforcing this additional claim.

The interest is to be computed from the day when the bill ought to be paid, and is carried on, to the time when final judgment may be signed.

The costs and damages usually consist of the re-exchange, provision, (or as it is more usually termed in this country, Bankers' Commission) and postage.

The following extracts from Pothier, will distinctly explain the nature of exchange and re-exchange. "The price of exchange arises from the circumstance, that in commercial places a bill drawn upon a particular place, is sometimes more valuable than money, and sometimes on the contrary money is more valuable than such a bill. This difference in value depends upon the abundance or scarcity of the money which is to be drawn for or remitted. Therefore if a negotiation takes place at Lyons, where the merchants

Have large sums to remit to Marfeilles, and but little to draw for there; there are more persons desirous of exchanging their money for bills upon Marfeilles than of exchanging such bills for money. Consequently the want of bills upon Marfeilles being greater than of money, they are of more value;" (*the balance is in their favour one per cent. or any other sum as the case may be,*) "and you must pay a banker at Lyons the amount of that balance in order to obtain such a bill; for instance, upon a balance of one per cent. 1010l. for a bill of 1000l. On the contrary if the merchants at Lyons have but little money to remit to Marfeilles, and a great deal to draw from thence; there are more persons who are desirous of exchanging their bills upon Marfeilles for cash, than their cash for bills upon Marfeilles; and the balance is in favour of cash. Therefore the banker in cashing my bill, will retain one per cent. or any other sum according to the course of exchange. This course of exchange is susceptible of much greater diversity in the transactions between different countries, than between different places of the same kingdom, and depends upon a greater variety of causes."

[When the sums to be drawn for, and those to be remitted are equal, or so nearly equal, as to leave no material balance on either side; there is no cause for any premium, and the exchange is at par.]

"In order to explain the nature of re-exchange we must observe, that the holder of a

bill, upon payment being refused, may take up from a banker, in the place where it is payable, the amount of the bill, and give him in return a bill payable at sight, upon the party from whom the first bill was received, or upon any other person. If he be obliged in consequence of the course of exchange, and the balance being in favour of cash, to pay a price for the money which he receives, that price is the re-exchange which must be compensated by the preceding parties to the bill."

The bill given by the banker should be drawn upon the place from which the other was remitted. If it be drawn upon any other place, so as to enhance the price of exchange, there is no ground for claiming reimbursement beyond the sum which must have been paid upon a bill drawn in the regular course. If there be no regular intercourse between the place where the dishonoured bill is payable, and that from which it was remitted, so that no cash could not be obtained for a bill payable there, the bill given in the course of re-exchange may be drawn upon some other place; but the interest of the person who made the remittance, and who must finally bear the expence, ought to be principally consulted in the arrangement."

When the payee of a bill indorses it over, and it is returned with the expence of re-exchange on the indorser, he is entitled to demand from the drawer the re-exchange which he has paid to the

terior holder, and also that which he incurs in taking up cash for the payment. And in like manner the indorser, drawer, and finally the acceptor, must pay the whole re-exchange incurred in returning the bill through the several stages of negotiation which it has passed. In a late case a bill for a sum which was equal to 60*g*l. was drawn in London upon Paris, and remitted to Amsterdam; when presented at Paris, the payment there was prohibited by law, and the drawer in London was charged with the re-exchange from Paris to Amsterdam, and from Amsterdam to London, amounting to upwards of 300*l*.—*Mellish v. Sir, Meon*, 2 H. B. 378.

In another case, also of recent date, it appeared, that a person discounted a bill in India for 2800 pagodas, at six guineas a pagoda, and that it was the constant course of trade with respect to bills returned protested from India, to allow at the rate of 10*s*. per pagoda, and 5*l*. per cent. upon the amount, after thirty days notice of nonpayment, which includes interest, exchange, and all other charges. This was objected to as usurious, but was allowed by the court of King's Bench as fair and reasonable.—*Auriol v. Thomas*, 2 T. R. 52.

By a law of Pennsylvania it was provided, that if any person there should draw or indorse any bill on Europe, which should be returned protested for nonpayment, the drawer, and all others concerned, should pay the contents, together with 20*l*. per cent. for damage. And it was decided by Lord

Hardwicke, that a person here who had authorized his creditor in Pennsylvania to draw upon him, was liable to the drawer for the money which he had paid in pursuance of this law, the same as if it had been by an express stipulation, and that it was a debt proveable under this commission.—Ambler, 672.

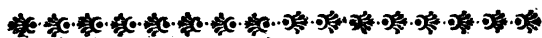
Present experience* unfortunately exhibits a striking instance of the position, that the price of exchange depends in a great degree upon the relative scarcity or abundance of money. Indeed it is obvious, that if the money, or other commodity, at a given place, is insufficient to answer the common exigencies of that place, the quantity which actually is there rises in consequence of the number of competitors, who are desirous of obtaining it, to a price beyond its common average. There is at this time a great scarcity of cash in Hamburgh, and large sums are due from Hamburgh to England. The person in Hamburgh who receives a bill drawn upon a merchant there, and dishonoured, has a right to take up the same cash which ought to have been regularly paid, upon giving his bill at sight upon England. But there are so many instances of dishonoured bills, and consequently such a want of cash to satisfy the holders, that cash for that purpose has risen to a price of near 20 per. cent. And therefore in order to obtain 100l. the amount which ought to be regularly paid by the drawee in Hamburgh, a bill

* This was written the latter end of 1799.

must be given upon England for 120l. and the person making the remittance is answerable to that extent, having his remedy over against all the antecedent parties.

It is usual for country banks to charge a commission of 5s. or 10s. per cent. upon the bills which they discount, or any money which passes through their hands. This was once supposed to be usurious, but is now decided to be a lawful charge, being a reasonable compensation for their trouble, and for the capital which they employ in providing cash to answer such exigencies, and is the same charge which in the French law is called *Provision*.

Any travelling expences or incidental inconveniences, are not to be computed as part of the damages occasioned by the non-payment of a bill.



CHAP. VIII.

Of the case of a Bill being Lost.

IT is said by Beawes, that "if a bill be lost by him with whom it was left for acceptance, or if by mistake he have given it to a wrong person, or on any other account, the holder cannot have a return of his bill, either accepted or unaccepted: he who lost it, must give the person to whom it was payable, or to his order, a note of hand for payment of its amount on the day it became due, on

delivery of the second, if it arrive in time, or ~~if~~ not, on the same note which in all cases is to have the law and privileges of a bill of exchange; and if the acceptor refuse this, the holder must immediately protest for nonacceptance, and when due, must demand the money, (though he have neither note nor bill) and if that be refused, a protest must be regularly made for nonpayment."—These observations seem to be founded in reason, and would most probably be adopted if such a case were to become the subject of litigation. Marius is of opinion, that if the holder lose a bill, and give immediate notice to the acceptor, the acceptor must not refuse payment merely because it is missing, and that the protest being made for nonpayment, an offer of a sufficient security and indemnification will oblige the acceptor to make good all losses, re-exchange, and other charges, as having wilfully occasioned them. And it is provided by the statute of William, that if any such inland bill, as is described in that act, shall happen to be lost or miscarried within the time limited for payment, the drawer shall be obliged to give another bill of the same tenor, the person to whom it is delivered giving security to indemnify him against all persons whatsoever, in case the bill shall be found again.

This provision seems to be borrowed from the French law, according to which mercantile questions were decided in a summary manner by consular judges, and the proper indemnity could be

regularly settled. The act has not pointed out what shall be a proper mode of enforcing the obligation which it imposes*.

We have seen that the holder, without notice of a bill which has been lost, has a perfect claim to recover, and it may be very difficult to define what shall be an adequate indemnity against such a claim. But it is customary in practice to pay the amount of bills which are lost upon receiving a satisfactory security.

The general obligation of the instrument, according to the laws of France, admitted of a positive provision for this purpose, much more conveniently than the laws of England. The ordinance there only related to bills payable to order. Every indorsement was special, and the person losing the bill had only to give security, that if he had indorsed it over, and the indorsee applied for payment, the person alledging the loss should indemnify the drawee. In England a bill indorsed in blank is afterwards transferrable by delivery, which renders the risk much more extensive than where the holder must necessarily derive his claim as a special indorsee.

* Since this was written, an action on the case has been sustained at Lancaster assizes for not complying with this statute, which as far as it appeared, was the first instance of the provision being enforced. In that case the party positively refused any security.



CHAP. IX.

Of the Right of Proceeding against the several Parties, and of partial Payments.

THE holder of a bill of exchange having, in case it is dishonoured, a claim upon all the parties who have given it currency, he may proceed against them all at the same time. The drawer, or any of the indorsers of a bill, may stay the action which is brought against him, upon paying the amount with the costs of the action against himself; but the acceptor of a bill, or the drawer of a note by whose default the whole expences are incurred, can only stay the proceeding upon payment of the costs in all the actions. A judgment against one of the parties, or an execution against his body, which does not produce a satisfaction of the demand, is no impediment to proceeding against the others, and if the acceptor is charged in execution at the suit of the holder, and the drawer afterwards pays the money, the acceptor is liable to him; for though the acceptor is discharged as against every other party by actual payment, that principle does not attach where there is only a formal satisfaction by being taken in execution—M'Donald v. Bevington, 4 T. R. 825.

It was once held that the holder having received part of the amount of a bill from the drawer on

indorser, might, notwithstanding, recover the whole amount from the acceptor; and as to the surplus, he would be a trustee to the person from whom he had received the part—*Johnson v. Ken- nion*, 2 Wil. 262. But this doctrine was over-ruled in a late determination of the court of Com- mon Pleas—*Bacon v. Searles*, 1 H. B. 88.*.

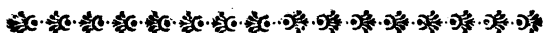
The payment to the holder of any part, even by a person not party to the bill, enures to the be- nefit of all the parties liable on the bill. Mr. Chitty adds, "that on the same principle, if the plaintiff has given only a consideration for part of the money for which the instrument was drawn, or the consideration which was to have been given by him, has in part failed, he will only be entitled to such damages as he has really sustained, but

* This was written prior to the publication of the case of *Walwyn v. St. Quintin*, B. and P. 652, in which it seems to be the opinion of Lord Chief Justice Eyre, that after an indorsee has received part of the contents of a bill from the indorser, he may recover the whole from the drawer or accep- tor; but the case of *Bacon and Searles* was not adverted to, and the opinion does not appear to have been fully acted upon. In point of reason, the opposite conclusion seems to be much stron- ger; for after the indorser has paid part to the holder, it would apparently be competent to him to bring an action for the amount against the antecedent parties; and if that is allowed, and the indorsee, having received a partial satisfaction, should recover for the whole, the drawer or acceptor might be liable to a double charge, for the indorser might disclaim recognizing the holder as his trustee, and institute his suit against the drawer or acceptor, who might not have an opportunity of recovering the excess before paid to the holder, and the course would at least be attended with unnecessary circuitry.

that it is reported to have been decided (Esp. 261) that if a bill is drawn in a regular course of business, or for money really due from the drawee to the drawer; in such case an indorsee, though he have not given to the indorser the full value of the bill, may recover the whole sum for which it is payable, and be the holder of the overplus as a trustee for the indorser."

I conceive that the law upon these subjects is stated rather too generally. It is allowed, that as between the payee and drawer, if no consideration is given, it is a defence to any action upon the bill, and the same rule is applicable in every case to the persons between whom there is an immediate privity, as an indorser and his own immediate indorsee. And where the consideration has only extended to part of the sum expressed in the instrument, or has partially failed, it may be considered so far as if no consideration had been given. But it certainly is contrary to every principle upon the subject, that if a person holding a bill upon which he is entitled to receive the full amount, transfer it to another, whether upon an inadequate consideration, or for no consideration, and by way of pure donation, this should diminish the obligation of the antecedent parties, who were previously liable to the whole extent and who are no wise concerned with the circumstances under which the holder derives his title. They certainly are not liable to more than one payment: and if the holder could only recover

from them to the amount of the consideration which he had given, as there would be no right of action in the person from whom he received the bill, they would, without any reason, be discharged from the remainder of their engagement. What incidental obligations may arise between the holder of the bill, and the person from whom he receives it, is a question of a very different nature, which may depend upon an infinite variety of circumstances, and is foreign to the object of the present discussion.



CHAP. X.

Of the Conduct requisite on the Part of the Holder.

OUR attention has been hitherto principally occupied in examining the rights incident to the holder of a bill, and the consequent obligations of the other parties, without adverting to the conduct requisite on his behalf to secure the benefits to which he is regularly entitled, or to the objections affecting the validity of the instrument, independent of the want of circumstances essential to its peculiar character. We now proceed to the discussion of the first of these topics.

The drawee is the person from whom payment is to be regularly obtained, and the obligations of the other parties are a security for the bill being

duly accepted and paid, provided the proper course is pursued by the holder.

When the bill is accepted, the acceptor contracts an absolute obligation for the payment of it whenever it may be presented. He cannot avail himself of any lapse of time except by virtue of the statute of limitations; neither can the right of the holder be prejudiced with respect to him, by any negotiations for the purpose of obtaining payment from the other parties, except under special circumstances, denoting an intention to discharge the acceptor from his liability. Where an acceptance was made payable at a certain banker's, and the bill was kept an unreasonable time after it became due, and the banker failed, it was held, that the acceptor was discharged. The foundation of this decision must have been that such an acceptance was considered to a certain extent, as equivalent to a check upon the banker, and the delay in presenting it induced the same consequences as a delay in presenting a common check. But in a subsequent case it has been decided not to be necessary in an action against the acceptor, to prove a presentment at the banker's, no special damages having arisen from any failure.—Vi. Bail. 78.—Esp. 115.—Chitty, 134.

SECTION I. Of presenting bills payable at sight, or demand, for payment; and bills payable at a certain period after sight for acceptance.

With respect to the circumstances necessary

to charge the drawer and indorsers.—The holder must present a bill payable at sight, or upon demand for payment, and a bill payable at a certain period after sight for acceptance, in a reasonable time; but what shall be deemed a reasonable time is not very distinctly settled. The following case before the court of Common Pleas, contains the most accurate view which can be given of the subject. Bills were drawn in London on the 5th of March, upon Palmer, in Calcutta, in favour of D'Eguino. D'Eguino on the same day indorsed them to Muilman for their full value, in a course of negotiation on the royal exchange. Muilman having received orders from his correspondents at Paris to procure such bills, drew on them for the amount, and his bills were duly paid; and on the 30th of April, by their directions, sent them over to a house at Calcutta. The ships conveying them arrived on the 3d of October. On the 5th, the agent to whom they were remitted, wrote to Palmer, who was not then in Calcutta, informing him of the arrival of the bills, and requesting his acceptance, which, by letter on the 17th, he refused. A fleet had sailed for Calcutta on the 5th of April, and arrived there early in September; and the drawer of the bill having failed, it was insisted on the part of the indorser that due diligence had not been used either in sending the bills to India, by the first ships which sailed from England; or in presenting them in India for acceptance, without waiting for Palmer's letter of the 17th. Lord Chief Justice Eyre left it to

the jury, whether the bills were presented in a reasonable time, intimating his own opinion that they were, and the jury having found a verdict accordingly; upon an application for a new trial, his Lordship said, that the course of argument did not call upon the court to lay down any new rule as to bills of exchange payable at sight, or a given time after: if it did, and it were necessary, he should feel great anxiety not to clog the negotiation of bills circumstanced like the present. It would be a very serious and difficult thing to say, that a person buying a foreign bill in the way that these bills were bought, should be obliged to transmit it by the first opportunity, to the place of destination. There would also be a great difficulty in saying at what time such a bill should be presented for acceptance. The courts have been very cautious in fixing any time for an inland bill payable at a certain period after sight, to be presented for acceptance; and it seems to be more necessary to be cautious with respect to a foreign bill payable in that manner. If instead of drawing their foreign bills payable at usances, in the old way, merchants choose for their own convenience, to draw them in this manner, and to make the time commence when the holder pleases, he did not see how the courts could lay down any precise rule upon the subject. He thought indeed that the holder was bound to present the bill in reasonable time, in order that the period may commence from which the payment is to take place. The question what is reasonable time, must depend on the particular

circumstances of the case; and it must always be left to the jury to determine whether there is any laches. Mr. Justice Buller said, that the only rule he knew of, which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be looked to, whether the bill be a foreign or an inland bill, and whether it be payable at sight, or at so many days after, or in any other manner. Upon these facts the jury had found that there was no laches, and there was nothing in the state of the facts to warrant the court to say that the verdict was against law. But here he must observe, and he thought a rule might thus far be laid down as to laches, with regard to bills payable at sight, or a certain time after sight, namely, that they ought to be put in circulation. If they are circulated, the parties are known to the world, and their credit is looked to; and if a bill drawn at three days sight were kept out in that way for a year, he could not say there was laches. But if instead of putting it in circulation the holder were to lock it up for any length of time, he (Mr. J. Buller) should say that he was guilty of laches, but further than that the rule cannot be laid down. Mr. Justice Heath also said, that no rule can be laid down as to the time for presenting bills payable at sight, or at a given time after; and the application for a new trial was refused—*Mullman v. D' Eguino*, 2 H. B. 567.

SECTION II. *Notice of refusal to accept*

It is not necessary to present a bill of exchange payable at a certain time, for acceptance; but if a bill (whether payable after date, or after sight, be presented, and acceptance be refused, a regular notice must be given; and in case of foreign bills, a protest must also be made, and notice thereof given, but the protest, or a copy thereof, need not be sent. The notice ought to be given as soon as the circumstances of the case will admit; if the parties live in the same town it should, if possible, be given on the same day. If the person to whom it is to be given live at any place to which there is a communication by the post it should be sent by the first post, but putting a letter into the post office, seems to be sufficient, although it may miscarry.—Vi. 2 H. B. 509.—Chitty 95. In the case just mentioned, respecting bills sent to India for acceptance, there was an opportunity of sending notice by a foreign ship bound for Europe, but not for England, by which the holder actually sent some letters to England. The notice was sent by the first English ships. Lord Chief Justice Eyre held it to be sufficient for the party in India to send notice by the first regular ships going to England, and that he was not bound to adopt the uncertain conveyance of a foreign ship. Mr. Justice Buller observed, that it was clearly sufficient to send it by the ordinary mode of conveyance. He did not say the party was bound to send the protest by

an English ship, but it was enough to do so by the first ship, whether English or foreign that was going to England in the regular course of conveyance.

A foreign bill should be protested on the day upon which acceptance is refused, or at least noted on that day, and the protest drawn up as of the same day upon the day following. And I think it very doubtful whether even that qualification can be allowed.

Whether notice must be given by the holder of the bill, or whether knowledge coming from another quarter, for instance from the drawee, is sufficient, is a point which in case of nonpayment has given rise to some difference of opinion; and whatever may be the true conclusion in respect of nonpayment, must apparently be so in respect of nonacceptance. Two judges, in a case that underwent considerable discussion, expressed their opinion very strongly, that it must come from the holder of a note, the purpose of giving notice being not merely that the indorser may know that the note is not paid, for he is only liable in a secondary degree; but to render him liable, they said you must shew that the holder looked upon him for payment, and gave him notice that he did so—*Tindal v Brown*, 1 T. R. 107. In a latter case before Lord Kenyon, at *nisi prius*, the acceptor of a bill left word at the drawer's house that it was dishonored, and his lordship said that it made no difference who apprized the drawer, since the

end of the notice was, that he might have recourse to the acceptor—*Shaw v. Croft*, Chitty, 98. It can hardly be necessary to suggest the prudence of steering on the safe side. If the drawee, or any other person on behalf, and by the authority of the holder give the notice, that is evidently sufficient. A notice from the holder, or any other person who may have a right of action upon the bill, may perhaps enure to the benefit of all the antecedent parties, and make a further notice from any of those parties, unnecessary. But it is advisable for each party immediately upon the receipt of notice, to give a fresh one to such of those parties as are liable over to him, and against whom he must prove notice—*Bailey* 83—*Chitty* 98.

Some of the books say that notice must be given to all the preceding parties to whom the holder intends to resort for payment; but I conceive this doctrine may admit of a qualification, so far as regards giving notice immediately on the bill being dishonoured; for the holder of a bill may be frequently ignorant of the address of any of the parties except the person from whom he immediately receives it; but it would be injurious that he should therefore be deprived of his remedy. The statute of Queen Anne in respect to the claim for damages, interest, and costs, only requires the protest to be sent, or notice to be given to the party from whom the bill was received. There does not appear to have been in any reported case, a ground for raising the question. In France the holder was obliged to

make a denunciation within fifteen days, against the drawer or indorser from whom he received the bill, and each indorsee had the same time, until at last it came to the drawer; the several parties were discharged if they did not receive the denunciation in proper time; but the holder, in order to support his claim of warranty against them, might institute the regular protests as standing in the place of the last indorser, being entitled to the same delay against each of them as their immediate indorsees.

It seems to be agreed that the bankruptcy or known insolvency of the drawee is no excuse for the want of notice. The authorities are chiefly applicable to the case of payment not being obtained when the bill is due; but if acceptance be applied for, and refused, they equally shew that these circumstances are not sufficient to dispense with the general rule.

SECTION III. *When notice may be dispensed with.*

If the drawer have no effects in the hands of the drawee, it is a settled point that no notice is necessary to be given to the drawer of a refusal to accept, or to pay a bill not previously accepted; the case of a refusal to pay an accepted bill, will be more regularly considered in a stage of our enquiry to which we shall presently arrive. In the case of *Bickerdike v. Bolman*, T. R. 405, in which it was decided that notice was not necessary to be given of refusing to pay a bill not previously accepted; Mr.

Justice Ashhurst put the drawing of such a bill upon the footing of its being a fraud; and Mr. Justice Buller said, the law requires notice to be given, for this reason, because it is presumed that the bill is drawn on the acceptor, on account of his having effects of the drawer in his hands, and if he have notice that the bill is not accepted or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice, and if it be proved that from the time the bill was drawn till the time it became due, the drawer never had any effects in the hands of the drawee, notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not, and if he had none he had no right to draw upon him, and to expect payment from him; nor can he be injured by the nonpayment of the bill or the want of notice that it has been dishonoured—*Bickerdike v. Bolman*. 1 T. R. 410. From this it might perhaps be inferred, that the mere circumstance of not having effects at the time of presentment for acceptance, is not sufficient to dispense with notice of acceptance being refused, as effects may come in before the bill is due; but there does not seem sufficient ground to warrant that distinction. The decisions in our courts have, in regard to this part of the subject, been conformable to positive ordinances of France.

In one case it became a matter of discussion whether the circumstance of the drawer not hav-

no effects in the hands of the drawee, could, in respect to the necessity of notice, be repelled by shewing a special damage from the want of notice. The fact suggested was, that a bill had been drawn by the appointment of a debtor of the drawer; and that for want of notice he lost the benefit of proceeding against such debtor. But the suggestion was not properly sustained, and the point was not particularly considered by the court. Mr. Justice Ashhurst said; that when the holder found that the drawee had no effects, he knew that by law he was not bound to give notice of nonacceptance. He was not bound to take cognizance of any private transaction between the drawer and a third person, which did not appear on the face of the bill. The counsel in argument had observed, that as the holder in general is bound to give notice of nonacceptance, if he take upon himself to withhold it from any collateral circumstances, he acts at his peril; if it appear that the drawer could receive no injury from the want of it, he is indemnified by the event; but still there is laches in him which that fact alone can justify.—2 T. R. 713.

The argument last cited, certainly is not unworthy of attention, and it will be advisable to give the regular notice, notwithstanding the holder is told that the drawee has no effects; for it is incumbent upon him to prove the truth of the fact, and not merely that such an answer was given*.

* V. the case of *Walwyn v. St. Quintin*, post.

Securities for raising money upon which ~~no~~ money has been raised, have been held not to be such effects as will take a case out of the general rule.—Esp. Ca. N. P. 515. According to the French ordinance, notice of nonacceptance was not necessary to the indorsers if neither themselves or the drawer had effects in the hands of the drawee. But the English courts have adopted a contrary rule, which certainly is more correct, for the indorsers are not bound to make themselves acquainted with the transactions between the drawer and the drawee, and are warranted in acting upon the supposition that the bill was drawn by a person having sufficient authority for the purpose.

In the case before alluded to, where the drawer not having effects in the hands of the drawee, insisted that he had sustained special damage from the want of notice, one principal point decided by the court was, that at all events, the objection was waived by a subsequent promise to pay.

There are two decisions that indorsers having made such promises without notice of the refusal to accept, were exonerated.—5 Bur. 2670.—1 T. R. 712. I shall consider the effect of these promises in stating the necessity of a notice for non-payment, a subject which will presently occur.

It is stated by Mr Chitty, that where the drawer or indorser is a bankrupt at the time of the acceptance or payment refused, it is unnecessary to

give notice to him or his assignee. In the case to which he refers in support of that proposition, *ex parte* Smith, III Bro. Ch. 1. Lord Thurlow declared, that he had often decided that the doctrine of notice, which holds amongst solvent persons, does not apply as between bankrupt estates: but he observed, that in that case the indorser only was a bankrupt, the maker and payee of the note were not. The decision related to the effect of receiving a composition from the acceptor. There does not appear to be any sufficient reason for dispensing with notice to the drawer, who is a bankrupt, or to his assignees, if the drawee is solvent, and still less for dispensing with such notice to the bankrupt indorser or his assignees, where the drawer remains solvent; because in these cases their rights to recover against the solvent parties, may be prejudicial by the want of notice. Where all the parties are bankrupts, no such prejudice can arise.

It has been held at *nisi prius*, that the absconding of the drawer will excuse the neglect to advise him—Esp. Ca. N. P. 516. But in a subsequent case, the court of common Pleas declined giving any opinion upon this point—*Walwyn v. St. Quintin*, B. and P. 652.

The sudden death, or violent illness of the holder immediately after the refusal of acceptance, may also possibly be an excuse. The observations of Pothier upon those accidents, are more immedi-

ately applicable to the subject of a presentment for payment.

SECTION IV. *Notice of conditional or partial acceptance.*

If an acceptance, varying from the tenor of the bill be offered by the drawee, the holder acquiescing must send notice thereof in the same manner, and within the same time, as if the acceptance were refused; otherwise he cannot have recourse to the drawer or indorsers; for to admit of such acceptance without notice, is to give credit to the acceptor: But it is said by Mr. Bailey, and apparently with justice, that where the drawee refuses to accept absolutely, and makes a conditional acceptance, the terms of which are complied with, no notice of the manner in which the bill has been accepted, is necessary. And where the drawer undertakes by his acceptance, to pay only part of the bill, the other parties to the bill are bound to the extent of his acceptance, and an omission to give notice of such partial acceptance does not discharge them from their obligation to that amount.

SECTION V. *Of presentment for payment.*

The next point to be considered is the presentment for payment. As against the acceptor we have already observed, that the time of making this presentment is immaterial, but in order to charge the drawer or indorsers, it is absolutely necessary.

That presentment for payment shall be made on the day that the bill became due, which is the last day of grace.

This presentment should be made at the place where the bill is appointed to be paid; and if payment is not made there, it is a default. And if a bill come into the hands of a person at whose house it is made payable, and he have no effects to discharge it, a formal demand of payment is not necessary.—*Vi. Saunderson v. Turtle*, 2 H. B. 509 Mr. Chitty says, "It would be so great a hardship if a trader, or other person who has accepted a bill, or is only a drawer, should have his credit blasted by the instrument being protested, merely because he had removed from the place in which the bill represented him to reside, that the law considers it as incumbent on the holder, in such case, to use every reasonable endeavour to find out whether he is removed, and in case he succeeds in such attempt, to present it for payment at that place." I have already combated this argument as applicable to a presentment for acceptance, and the place of payment being so material an object to the person who takes a bill, I cannot accede to the position that the holder is under any obligation to enquire further than at the place expressed in the bill.

The same writer very justly objects to the doctrine, (which however appears too firmly established to be shaken) that an acceptor cannot insist as a defence in an action, on the want of a present-

ment before the commencement of it; as the acceptor, unless a demand were necessary, might, on account of the negotiable quality of the instrument, and the consequent difficulty to find out the holder of it on the day of payment, in order to make a tender to him, be subject to an action without any default whatever. The rule which is adopted must have arisen from not distinguishing between debts, which create an immediate and absolute duty, that the party must discharge at his peril, and negotiable instruments, which (in principle at least) only constitute an engagement for paying the amount whenever they shall be presented for the purpose.

From incidental expressions which occur respecting this subject, it might be supposed that if a bill were refused acceptance, it must be presented for payment in order to charge the drawer or indorsers, but I conceive that this cannot be the law, for a complete right of action attaches immediately on the refusal to accept, and that right may have been perfected by judgment and execution previous to the day of payment. Being once fully vested, it cannot, consistently with reason, be afterwards defeated by the mere neglect to present for payment. Such a construction would suppose the same right to be complete, and merely inchoate, which is contradictory. The notion must, like many others which have been mentioned, have arisen from supposing foreign ordinances of positive authority, to embrace general principles. We have formerly seen that in

FOR PAYMENT.

France a protest for nonacceptance was, in effect, a protest for better security.

It is no excuse for not presenting a bill for payment, that the person on whom it is drawn is notoriously insolvent. A strong case, respecting this point, lately occurred before the court of Common Pleas—Green being indebted to Nicholson, and several other creditors, prevailed upon Benton and Gouthwaite to give security for him, which was done by their indorsing notes drawn by Green, and payable at the house of Drury. Gouthwaite knowing that these notes would not be paid, directed Drury to refer the persons who brought them, to him. Nicholson did not present his note till three days after it was due. If it had been presented when due it would have been paid, as Benton had lodged sufficient money in Gouthwaite's hands for the purpose, but had paid it away in consequence of the note coming. It was held, that Gouthwaite was discharged, although the Chief Justice at first thought, that under these circumstances, Gouthwaite knowing that Green had no money in the hands of Drury, and having provided money to answer the note, he could not be injured; but after the case had been discussed in court, his lordship thought that as the guaranty was given in this mode, the legal consequences would follow so as to limit its generality. He observed, that perhaps it would be better to adhere to the rule than to relax it. It founded harsh that a known bankruptcy should not

be equivalent to a demand or notice; but the rule was too strong to be dispensed with—2 H. B. 609. Pothier speaking of this subject, and referring to the authority of Savary, that a protest is necessary in case of a notorious insolvency, observes, that the formalities established by the laws, to apprise persons of any fact, cannot be dispensed with, and do not admit of an equivalent (*ne se suppleent point et ne s'accroplissent par equipollence.*) For instance, he says, the formality *de l'insinuation des donations*, was established for the purpose of apprising those who had an interest in knowing them, yet the person claiming under a donation, is not excused from that formality, even as against persons whom he could fix with knowledge of the donation. For the same reason the holder of the bill is not excused from making a protest, and giving notice to the drawer and indorsers, although the notoriety of the failure of the drawee, may appear to have given them sufficient information of the default of payment. It is even not impossible that they may be ignorant of the failure, however notorious, or not seeing the protest, they may suppose that the holder has found means of getting the bill discharged.

These principles are certainly correct. Where a definite rule is prescribed, it may be easily decided whether it has been followed or deviated from. But where it is allowed that any thing may be substituted which is equally beneficial, an inlet is given to perpetual litigation, by making every case dependant on its own particular circumstances.

Mr. Chitty observes, that the neglect to make a proper *presentment* may be excused by circumstances similar to those which have been decided to render it unnecessary to give notice of nonacceptance, as where the drawee has had no effects of the drawer in his hands, from the time of drawing the bill to the time when it is due. And there is a case which seems to warrant that position. A promissory note was drawn by one Brown, who was known to be insolvent; the payee gave no value for it, and lent his name merely to give credit to it, well knowing at the time of drawing and indorsing, that Brown was insolvent. The note was not presented to Brown until the day after it was due, and no notice was given of the nonpayment until some days after; but it was resolved that the indorser was liable. Lord Chief Justice Eyre said, "An early demand is in general required, because if any delay take place, the effects may be gone out of the hands of the acceptor, and if the holder choose to wait, he does it at his own risk. But apply this rule to the case of known insolvency: what does it signify to the person who is liable in the second stage at what time the demand is made on the drawer, who was known to be insolvent from the beginning. General rules are established for general conveniences; and I agree that if the drawer be not known to be insolvent, the fact of insolvency will not excuse the want of an early demand; but the fact of knowledge excludes all the presumptions that would otherwise arise. Then as to notice, and the application for payment to the defendant, what did

it signify when that application was made? It could make no difference to him whether it was made on one day or another; he meant to guarantee the payment of the note, and there was no possibility of any loss happening to him from the want of notice. In this instance, therefore, the general rule fails of its application." Mr. Justice Buller concurred in the same conclusion. He agreed that insolvency does not take away the necessity of notice where value has been given, but the position was true no further. The indorser lent his name merely to give credit to the note, and was not an indorser in the common course of business—*De Bert v. Atkinson*, 2 H. B. 336. The case last stated, was decided prior to that which I just before referred to; and though in the latter case it were not expressly overruled, or even mentioned, the two decisions can scarcely be reconciled. In both cases the person who insisted upon the want of presentment and notice, was the indorser of a promissory note, coming forward as a security for the drawer, who was known to be insolvent: the only distinction is, that in the one case the indorser was a previous creditor; in the other, a person who gave a consideration for the note; but this is a difference rather in circumstance than principle, and was not adduced as a ground for the second adjudication. The case which adopts the construction, that the indorser undertakes that if the note be presented according to its tenor, and notice duly given of nonpayment, he will discharge the amount, seems

upon the whole judicious, and is clearly most free from the embarrassment attending particular enquiries. It may be further observed, that the drawer or indorser stipulates in effect for presentment, according to the regular order of the bill, His engagement is, that the bill so presented shall be paid, and without presentment that engagement is not violated. There is not an exact analogy between the case of a person drawing on another in whose hands he has no effects, and the payee indorsing a promissory note for the accommodation of the maker. In the first case the drawer is to advance the money, and the drawee, if he accept, only does so as his surety. In the other case, the maker is the person intended to pay the money, and there is no equity in calling upon the surety without a regular demand upon the principal, and notice of his refusal to pay.

In case of the death of the acceptor, it is said by writers upon this subject, that a demand should be made to his personal representative, and in case there is no executor or administrator at the house of the deceased.—The sentiments of Pothier are as follows:—"It may be enquired whether the bearer is excused from the necessity of making a protest when the drawee is dead, and his widow and presumptive heirs alledge that they are taking advantage of the delay allowed by the law for making their election to accept or renounce the succession? It must be decided, that he is not therefore excused from making his protest, and this an-

swer of the widow and the heirs being stated in the protest, is tantamount to a refusal, and gives the holder a right to have recourse to the drawer and indorsers. If the deceased have not left either widow or presumptive heirs, I think (he adds) that, even in this case the holder is not excused from making a protest, and that it ought to be made at the house of the deceased."

In a case before alluded to, an action being brought against the indorser of a *promissory note*, it appeared that the note was payable on the 27th of December, and the drawer had shut up his house and went away the November before; and the question was, whether in general a demand upon the drawer was necessary before the indorser could be charged? and if it was, whether the holder had shewn sufficient in proving the shutting up of the house? Lord Chief Justice Lee, before whom the cause was tried, ruled, that a demand on the drawer was necessary, as had been before decided in the court of Common Pleas. And in this particular case he was of opinion, that the plaintiff had not gone far enough, but ought to shew that he had enquired after the drawer, or attempted to find him out—2 Str. 1087. I have inserted this case in conjunction with the doctrine, respecting the death of the drawee; as partly referable to the same general principle. It is obvious from the question being made, whether a demand upon the drawer of the note (who is in effect the same character with the acceptor of a bill) was ne-

necessary that the subject had not been then reduced to a regular system. From the indistinctness of the report it does not appear whether any application was made at the house on the day of the note becoming due; and, at any rate, much stress ought not to be laid upon the loose note of a case at *nisi prius*. My own idea is, that a presentment at the house where a bill or note is made payable, is sufficient, and that if the drawee be dead or removed, the collateral enquiries ought to fall not upon the holder, but upon the indorser, or finally the drawer, who have engaged for payment at that place—That if a place of payment be not expressed, and the drawee be dead, application should be made at his last dwelling house, and the bill not being paid there, should be taken up by the anterior parties, without subjecting the holder to search for the personal representatives—that if the drawee of a bill or maker of a note (no place of payment being expressed) have removed openly and notoriously, and have a known place of residence in the kingdom, application should be made at his residence: but if he have absconded, or have left the kingdom, it should be made at his last known place of residence, and that payment not being made there, the holder should have redress as in the common case of payment being refused. In this, as in all other instances, my opinion is merely suggested, affording matter for consideration, and not as assuming a decision of the subject.

Pothier observes, that if by reason of any unforeseen and inevitable obstacle, (*force majeure et imprevue*) the protest cannot be made on the proper day, (and I conceive that whatever he lays in this respect concerning the protest, may be applied to the presentment for payment) the omission to protest on that day shall not deprive the proprietor of his rights of action against the drawer and indorsers; for no man is bound to do what is impossible, but he is only liberated from this default by making the protest as soon as may be afterwards, and within a time which, according to the discretion of the judge, shall appear to be sufficient; as if the proprietor of a bill remit it to his correspondent to receive payment, and the correspondent dies suddenly on the day when he should go to receive the money, or protest the bill, The want of making a protest on that day will not defeat the proprietor's right of action, provided the proper steps are taken afterwards, within what may appear to the judge a reasonable time for receiving information of the accident, and giving directions for the necessary steps to be taken. For the same reason, if the correspondent be attacked by a violent illness which does not leave his mind at liberty to attend to business, it will be an excuse; but if after he be sufficiently recovered he neglect to make the presentment, the right of action is lost, for every man is chargeable with the neglect of his agent.

Marius truly observes, that an executor should

present a bill for payment, though he have not proved the will. This is no more than an application of the rule, that an executor before probate is competent to every act, except bringing actions; but though there be no executor, I conceive that the presentment ought to be made at a proper time. And in case of the sudden death of *the holder of the bill*, and the instances mentioned by Pothier, it may be very questionable how far the drawer or indorsers would be chargeable (especially if payment would have been made upon a presentment in proper time) for though it be admitted that there is no laches in the holder, it must equally be observed, that there is no laches in the other parties, and their engagement is only that a bill shall be paid if regularly presented. The accidents which occur, though unaccompanied by any fault, should fall upon the owner of the property affected by them, and not upon others who are equally innocent.

Molloy says, that if a bill of exchange by contrary wind or other occasions, be so long on the way that the usance, or time limited by the bill be expired, and being tendered, both acceptance and payment are denied, protest for both must be made, and the drawer must answer the value, exchange and re-exchange. The protest for non-acceptance in this case cannot be necessary, but in other respects the doctrine is evidently founded upon reason, provided the bill is remitted by as early an opportunity as the nature of the case re-

quires and admits. The case differs very materially from those which were discussed in the preceding paragraph, because the maker of a bill to be paid in foreign parts, must necessarily be supposed to contract with reference to ordinary contingencies incident to the subject, and with exception for such inevitable delays; whereas circumstances merely personal to the holder of a bill, cannot be presumed to have been equally in the contemplation of the drawer or indorser.

It appeared to be the custom of the commissioners of excise, in the case of bills drawn in their favour, and specifying that it was for the king's money, to allow six days beyond the day of grace, upon the acceptor paying a shilling to the clerk for his trouble. And Lord Mansfield held, that it was not in the power of any particular office, by particular indulgence in any case, to charge the drawer of a bill; but this was a general custom ingrafted on such bills, and being known universally, must bind the parties.—Esp. N. P. 60. But with deference to so great an authority, the propriety of this decision may be fairly doubted. The word *custom* possesses an ambiguity which has, in many cases, been productive of inconvenience. Where it is applied to the habits of a particular individual or a particular body, it is merely founded on their inclination, and does not appear to be in any wise obligatory upon them: it is not sufficient to induce those consequences which result from the *lex loci* of a particular place, or from the

general usage of the mercantile world; and it seems no more competent to the commissioners of excise to introduce an exception to the general rule of law, than it would be to the house of Child or Theluffon.

Whatever has been already said respecting the necessity of giving notice of the protest of a foreign bill of whatever denomination, and of an inland bill of particular descriptions, in order to induce a right to damages and interest, in the case of non-acceptance; may be applied to the refusal of payment. Possibly it may not be necessary to give notice that a drawee of a bill, payable at a certain period, cannot be found, in order to make a presentment for acceptance, but it must be absolutely requisite to give such notice, or to make a protest in case payment cannot be obtained. If an inland bill be presented for acceptance, which is refused, and notice be duly given, and it is afterwards presented for payment, a protest for non-payment is apparently sufficient under the statutes, in order to support a demand for interest and costs, and in fact it is not usual to make a protest for non-acceptance. It may also be collected that if there be a protest for nonacceptance no protest is necessary for nonpayment. This is the construction which Mr. Kyd argues, (apparently with justice) should be given to the very inaccurate language of the statutes.

Pothier observes, in regard to the ordinance

OF PRESENTMENT.

which renders notice unnecessary if the drawee have no effects in the hands of the drawee; and which, as we have seen, is adopted by the decision of our courts, at least as a general rule, that the law is the same even if the drawee have accepted the bill, for by his acceptance he has made himself the debtor of the holder, but not of the drawer, who has omitted to remit him funds to satisfy it—This observation necessarily supposes it to be the intention of the drawer and the acceptor that the remittance shall be made by the former.

The general question, whether notice of non-payment of an accepted bill is unnecessary, the acceptor having no effects of the drawer, is of very great importance, and does not seem to have been directly settled, though in a case which occurred in the Common Pleas reported, subsequent to the writing of this essay, and already more than once alluded to upon other points, it is taken for granted that such is the law; and the case was decided upon the question, whether the particular circumstances induced an exception. Supposing that opinion should not be accurate, and the law had not been thus previously settled, the case itself may perhaps not be deemed conclusive upon the subject.

In the case referred to, the bill was drawn to accommodate the indorser, who had placed securities in the hands of the acceptor, on which he wished to raise money, but the drawer had no

effects in the hands of the acceptor, and it was held, that notice of nonpayment to the drawer was not necessary. Lord Chief Justice Eyre, in delivering the opinion of the court upon this point, said, "The true fact is, that this was the acceptor's bill, and not the drawer's. In a regular bill transaction, the drawing by A. payable to B. is a mode by which the drawer pays a sum of money to his payee or indorsee through an acceptor. The transaction in this case, was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor. This is reversing the order of things. As far as concerns the drawer, it is what it has been called, a mere accommodation; and all consideration of effects of the drawer in the hands of acceptor, may be laid aside. It seems clear, that notice can be of no use to him, his situation being this, that if the acceptor do not pay, he must, and may then, and not till then, resort to the acceptor to be reimbursed; notice therefore can amount to nothing, for his situation cannot be changed. If there be any case in which notice may be dispensed with, surely it is this. Perhaps indeed it ought never to be dispensed with, since it is a part of the same custom of merchants which creates the duty, especially as the grounds for dispensing with it are such as cannot influence the conduct of the holder of the bill at the time when he is to determine whether he will or will not give notice, for ninety-nine times in a

hundred he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. *It has, however, been resolved in many cases, where the drawer has had no effects in the hands of the acceptor, that notice might be dispensed with*.* But it may be proper to caution bill holders, not to rely on it as a general rule, that if the drawer have no effects in the acceptor's hands notice is not necessary. The cases of acceptances on the faith of consignments from the drawer not come to hand, and the case of acceptances on the ground of fair mercantile agreement, may be stated as exceptions, and there may possibly be many others. Where the drawer has no effects, and has no fair pretence for drawing, or where he draws without having effects intended to be applied in payment, and only for the purpose of raising money by discount for himself, and *a fortiori* for the acceptor, which is this case, it is fairly deducible from the cases which have been resolved that notice need not be given.—*Walwyn v. St. Quintin, B. and P. 652.*

In considering the general question it may not be improper to advert to the principle which is stated by the judges who decided the case of Bickerdike and Bolman, in which case no acceptance had been made. Mr. Justice Ashurst put it

* This fact is taken for granted, perhaps, too hastily; no instances of such determination being to be found as applicable to accepted bills.

upon the footing that to draw a bill where there were no effects, was a fraud, and Mr. Justice Buller observes, that if he have no effects of the drawee in his hands, he has no right to draw upon him, and expect payment from him.

Now neither of these reasons can possibly apply where the drawer actually engages to make such payment, and in fact very considerable inconvenience and expence may arise from the disappointment of such expectation. There may be many adequate considerations for the acceptance and payment of a bill, besides the possession of effects to answer it. For instance, the allowance of a commission; and where it is understood and agreed that the acceptor shall advance the money, the drawer has no inducement to suppose it necessary that he shall provide for it, and it is not reasonable that he should be subjected to charges and discredit for omitting to do so. But whatever opinion may be entertained upon the question respecting a general acceptance, where the money is to be ultimately provided by the drawer, it seems very difficult indeed to assent to the doctrine adopted in the case of *Walwyn and St. Quintin*.

The principle in *Bickerdike and Bolman* is, that the drawer has no right to expect payment by the drawee, in whose hands he has no effects; but in the case of *Walwyn and St. Quintin*, the drawee had security; had assented to the payment: the drawer was a surety to assist the circums-

lation of the bill; no money was intended to be advanced by him; and after the regular time of payment was elapsed, he had every reason to suppose that the bill was duly honoured. It is said, that where the money is for the use of the drawer, notice need not be given, *a fortiori* then were it is for the use of the acceptor. But surely this is in direct contradiction to the principle alluded to. To every substantial purpose as to the point in question, the circumstance that a bill is drawn for the benefit of the acceptor, is equivalent to the acceptor having effects of the drawer.

Much prejudice might, under the circumstances of the immediate case, have resulted from the want of notice. At the distance of several years after the drawer (a mere surety) had every reason to suppose the bill satisfied, either by the acceptor who had engaged to pay it, or by the indorser, on whose account it was to be paid, he might be unexpectedly called upon, and by the death or bankruptcy of the other parties, deprived of the opportunity of redress, whereas if immediate and regular notice had been given, he might have taken up the bill whilst he had the means of indemnifying himself.

If the holder of the bill is to be excused from pursuing the regular course, prescribed by law on account of the equitable circumstances between the other parties, of which he has no concern, those circumstances should at least be viewed in the ag-

gregate, and applied to the principle which renders them material. Where a variation of the circumstances destroys the principle, on account of which the exception is introduced, the exception should not be allowed to continue. It is much more satisfactory to advert to the opinion given by the same respectable authority in another case already cited. "That as the guaranty was given in that mode, the legal consequences would follow so as to limit its generality, and that perhaps it would be better to adhere to the rule than to relax it."

SECTION VI. *Of waiving the want of notice.*

Upon the subject of waiving the want of notice by a subsequent promise, or other act in its nature equivalent, some particularity of discussion may be necessary. It is stated by Mr. Chitty, "that a payment of part, or a promise to the holder by the person insisting upon want of notice, amounts to a waiver of the consequence of the laches of the holder, and admits the right of the holder to resort to him. If however a promise be made without a knowledge of the fact, or according to a late case, of the legal consequences of the holder's not having given notice, it seems that it will not amount to a waiver; and it has been determined that a drawer or indorser in such case having actually paid the amount of the bill to the holder, may maintain an action for the recovery of it. But as the rule requiring notice of the dishonour of a bill

to be given by the holder, is *stricti juris*, and does not always meet the justice of the case, it might not perhaps be improper to require proof from the plaintiff in such an action, of his being injured by the want of notice.

There certainly are decisions warranting the whole of the preceding observations; but the authority of some of those decisions may perhaps be doubtful; and it may be requisite rather to consider the true principles which ought to regulate the subject than implicitly to adhere to any particular determination.

In the late case referred to by Mr. Chitty, and stated by him in a note, the holder of a bill gave time to the acceptors, and they afterwards became insolvent, of both which circumstances the holder gave the drawer notice. And the drawer having paid the amount, Lord Kenyon held at *nisi prius* that he was entitled to recover it back. He said, it was not enough that he should know all the facts, but that he should know the legal consequence of them. Where a man knowing all the facts explicitly, and being under no misapprehension with regard to any of them, nor of the law acting upon them, chooses to pay a sum of money, *volenti non fit injuria*, and he shall not recover it back again, but the letters of this plaintiff prove the direct contrary; they are written in a complaining style.—This case was brought before the court of King's Bench, and the opinion given by

his lordship at *nisi prius*, was confirmed: but the decision is not reported, which is rather unaccountable, as it certainly asserts more strongly and explicitly than any preceding case, the important proposition that a person may recover back what he has paid under a mistaken idea of legal obligation. In a case which occurred not long before, an action was brought against the indorser of a bill, and the same learned judge having properly ruled that the circumstance of the drawer having no effects in the hands of the drawee, was no excuse for want of notice to the indorser; evidence was given of a promise to pay, upon which the plaintiff recovered a verdict.—Peake 202. The latter point it should seem from the report, passed as of course and without discussion; but if a person having paid a bill to which he was not liable, shall be allowed to recover it back, the argument that a promise of payment under similar circumstances, shall not be obligatory, is much more strong. The degree, of legal knowledge, which a person may possess, or the mistaken notions under which he may act, can seldom be the subject of accurate investigation. If a person with a view to voluntary donation, or in execution of what he conceives to be an honorary obligation, actually pays a sum of money, he has no pretence to reclaim it; but a promise under these circumstances, not being made upon any adequate consideration, induces no legal obligation. It is a general presumption that a person does not intend

to give away his property*, and therefore when the indorser of a bill being exempted from his liability in point of law, but pressed for payment, does any act importing a promise, it may be justly inferred that such a promise is made under the idea of his being already subject to legal coercion. A prior moral obligation is sufficient to support a legal promise; but there is no such obligation on the part of an indorser of a bill of exchange in the ordinary course of business. He gives an adequate value upon passing it away, acting in both instances upon the supposition of its being an available security, and engaging in the latter case (in effect as security for the drawer or acceptor) that it shall be regularly paid, provided it is properly presented, and a regular notice given of its being dishonoured. But there is no reason founded upon moral equity, for extending the obligations of such a person beyond the legal import of his undertaking; and it would therefore be more reasonable, as a general proposition to decide, that such an indorser might recover back what he had paid, not being liable in point of law, than that he should be bound by a naked promise unaccompanied by any legal or moral obligation. In advert- ing to the old cases, we find a case at the sittings in Middlesex where the indorser of a promissory note having paid part of the money, Lord Chief Justice Lee ruled, that it was sufficient to dispense with proving a demand upon the maker—Str. 124.

* *Nemo presumitur donare.*

From the loose note of this case it cannot be fully collected what were the circumstances of it. At any rate such a note ought not to be deemed a sufficient authority to decide contrary to what may appear to be the true conclusion resulting from a full examination. But I at all times subscribe to the position that a point which is fully established by a current of legal authorities, ought not to be overturned by an analysis of the principles upon which it is founded, however useful such an analysis may be in preventing its further extension.

The case of a drawer of a bill of exchange, or the first indorser of a promissory note, may be materially different from that of an indorser, who passes the instrument in the course of circulation; for they have property in the hands of the acceptor or drawer, and unless they suffer some detriment from having appropriated it to the payment of the bill or note, as by the insolvency of the person who is to pay, there is an adequate consideration for any promise or payment which they may make to the holder, their effects are relieved from the appropriation, and they acquire the full disposal of them. In one of the cases where a promise was held to be obligatory, there certainly was no laches, as the indorsee gave notice to the indorser as soon as he could procure information of his address—Bul. N. P. 276. In another case, the maker of a promissory note could not be found at the time when it was payable, and after some delay, application was made to the payee, who pro-

mitted to pay it. *The maker was solvent when the note became due, and continued so for some time after.* Mr. Justice Wilmot thought that the payee had waived the neglect, but he left it to the jury, who found for the defendant.—Bsp. 58. This certainly is an exemplification of Mr. Justice Buller's remark in *Lickbarrow and Mason*, that, before the time of Lord Mansfield all the evidence in mercantile cases was thrown together; they were left generally to the jury, and they produced no established principle. Where a failure has actually taken place at the time of the payment or promise, the situation of the drawer of the bill or maker of the note is essentially altered, and is materially affected by the laches of the holder, therefore their acts under these circumstances, fall in a considerable degree within the observations already applied to the case of a general indorser.

In a cause formerly mentioned, the drawer who insisted that he had sustained an injury from want of notice of nonacceptance, though he had no effects in the hands of the acceptor, made a promise of payment, which the court considered as sufficient to do away the special circumstances; but those circumstances not being proved, the case cannot as a *decision*, overturn the effect of any reasoning upon the subject, though certainly entitled to great respect from the opinion which was expressed.—*Rogers v. Stevens*, 2 F. R. 713.

Supposing a bill not to have been accepted, and

payment to have been refused, laches being imputable to the holder, and the drawee having sufficient effects; if the drawer should afterwards in fact, receive the whole of his effects from the drawee, it might be reasonably contended that the fact being established of no detriment having occurred to the drawer, he should be bound to pay the bill, otherwise he would, from the laches of the holder, receive not merely an indemnity but an advantage, and that without any pretence, and at the expence of the holder. Pothier speaking of the loss which falls upon the holder for a neglect to present, says, that the damages of the drawer consist in the loss from the drawee's insolvency, with respect to the funds remitted by the drawer for the discharge of the bill, and which he might have drawn out of his hands if notice have been given. The reparation of the damages consists in making the holder bear the loss of this insolvency in lieu of the drawer, by withholding all recourse against the drawer, *saving to the bearer the right of getting payment if he can from the drawee, against whom he may exercise the rights of the drawee.* This passage will warrant the observation above suggested; and also the further consequences that the holder may at his own risk, sue the drawee in the name of the drawer, for the funds in his hands, and in case of the drawee's bankruptcy may insist upon receiving from the drawer the dividend in respect of the funds applicable to the payment of the bill. But nothing

appears to have passed in our courts, either to confirm or contradict this course of reasoning.

SECTION VII. *No demand on the drawer of a bill of exchange is necessary to charge the indorser.*

An idea was once entertained, founded upon the inaccurate report of an opinion of Lord Chief Justice Holt, that the indorsee of a bill must demand payment of the drawer, before he can have recourse against the indorser, but the notion was first exploded with respect to foreign bills; and afterwards in respect of inland bills, by two cases which are the more valuable as they led to an accurate discussion, and a clear developement of the general nature and character of these negotiable instruments. In one of these cases Lord Mansfield said "When a bill of exchange is indorsed by the person to whom it was made payable, as between the indorser and the indorsee, it is a new bill of exchange, and the indorser stands in the place of the drawer. The indorsee does not trust to the credit of the original drawer; he does not know that such a person exists, or where he lives, or whether his name may have been forged. The indorser is his drawer, and the person to whom he originally trusted, in case the drawee should not pay the money."—*Heylin v. Adamson*, Bur. 669.

SECTION VIII. *Of Protests.*

The law respecting protests, has been frequently referred to in the process of this essay; but it

may be convenient to make it the object of a separate examination. In the case of foreign bills a protest is universally necessary, whether for nonacceptance or nonpayment, and whatever may be the nature of the bill. The protest constitutes an essential part of the custom of merchants, and is requisite not merely on account of the damages and interest, but also on account of the principal sum for which the bill is drawn, (the case of the drawer not having effects in the hands of the drawee, being excepted so far as relates to the right of recovering against the drawer himself, but not against the indorsers.) With respect to inland bills, a protest is only necessary on account of damages and interest, and is founded upon the statutes 9 and 10 W. c. 17, and 3 and 4 Anne, c. 9, made perpetual by 7 Anne, c. 25. The first of these enacts, that all bills drawn in or dated from any place in England, Wales, or Berwick, of 5l. or upwards, upon any person in London or any other place, in which shall be expressed the value to be received and drawn payable at a certain number of days, weeks, or months; after presentation and acceptance in writing, and after the expiration of three days after the bill shall become due, the party to whom they are payable may cause them to be protested by a notary public, and in default of such notary public, by any other substantial person of the place, in the presence of two or more credible witnesses, refusal or neglect being first made of due payment. The protest is to be made under a copy of the bill in a certain form which is prescribed, and within fourteen

days after the making thereof, it is to be sent, or notice given to the party from whom the bill was received, who is, upon producing the protest, to repay the bill, together with all interest and charges from the day the bill was protested.

It is to be observed, that this statute only extends to protests for the nonpayment of bills of the value of 5*l.* and upwards, expressed to be made for value received, payable at a certain period after date, and accepted in writing. If such an acceptance was refused, consequently there could not be under the statute any remedy. According to the literal import of the words, it would appear that there could be no claim for damages and interest, except against the person from whom the bill was immediately received, but this construction has not prevailed in practice. The term of fourteen days for giving notice of the protest, is borrowed from the French jurisprudence, which required the holder within that period to pursue his immediate indorser in warranty, and the like time was prescribed to the respective indorsers, for pursuing the parties from whom they had respectively received the bill up to the drawer. This was satisfied by sending the bill with the protest; but according to the modern decision of the English courts, there must be an immediate notice given in order to entitle the holder, or the respective indorsers to his remedy for the principal sum. The literal construction of the statute is, that a protest cannot be made until after the third day of

grace. And Lord Kenyon, in a case that has been before adverted to, intimated his opinion, that such construction must prevail. Mr. Justice Ballester seemed to be of a different opinion—*Leftly v. Mills*, 4 T. R. 170. A foreign bill must be protested on the last day of grace, or at least noted on that day, and the protest drawn upon the following day, as of the day preceding; and it may be very doubtful whether even that exception can be allowed.

In order to supply the deficiency of the statute of William, and particularly on account of its being confined to bills actually accepted in writing, the statute of Anne provides, that if upon presenting any bill, such as is described in the former statute, the party upon whom it is drawn, shall refuse to accept it by under-writing the same, the party to whom it is payable, may cause it to be protested for nonacceptance as in case of foreign bills.

There is then a very obscure provision, that no acceptance shall be sufficient to charge any person, unless the same be underwritten or indorsed thereon, and if it is not so accepted, no drawer shall be liable to pay costs, damages, or interest thereon, unless such protests be made for nonacceptance, and within fourteen days sent, or notice thereof given to the party from whom such bill was received; and if accepted, and not paid before the expiration of three days after it shall become due, then no drawer shall be compellable to pay any costs, damages, or interest thereon, unless

a protest ~~be~~ made, and notice thereof given. ~~Ne-~~vertheless any drawer shall be liable if any ~~one~~ protest be so made, and notice thereof given.

The first part of this clause seems to import that a verbal acceptance is of no force whatever, but this general expression is deemed to be qualified by the particularity of the subsequent part of the clause, and by a proviso that the act shall not discharge any former remedy, and the true meaning is held to be, that if there is an acceptance, but not in writing, the drawer shall not be liable to any damages. &c. for nonpayment.

The other part of the clause is still more obscure. In the exposition of it Mr. Kyd seems to have drawn the true conclusion, that if a bill be not accepted by underwriting or indorsement, when presented for acceptance, and when presented for payment, be not paid, then if it be not protested either for nonacceptance or for nonpayment, the drawer shall not be liable for damages, interest, and costs. The same writer states, that according to the general practice of merchants in the city of London, a protest is hardly ever made for nonacceptance of an inland bill, it is only noted for nonacceptance, and if not paid when due, it is frequently protested for nonpayment.

The course of proceeding when a protest is made is as follows:—The notary public, or if there is no such notary in the place, any other person, at the request of the holder of the bill, goes to

the drawer, and demands acceptance or payment, and if the drawee refuses the notary or other person makes a minute on the bill, consisting of his initials, the date, and his charges for minuting. This is called the Noting. He afterwards draws up a solemn declaration, which is called a protest. All foreign courts give credit to the acts of a public notary. The following are Mr. Justice Buller's observations upon this subject:—"In making a protest there are three things to be done, the noting, demanding, and drawing up the protest. The noting is unknown in the law as distinguished from the protest; it is a preliminary step to the protest, and has grown into practice within these few years. The next and material part is the making the demand. The party making the demand must have authority to receive the money, and in case that is refused, the drawing up the protest is mere matter of form; but if the person on whom the demand is made, be ready to pay the amount of the bill, he does all that the law requires of him, and he is not liable to pay the fees of protesting."—*Leftly v. Mills*, 4 T. R. 170.

There is a proviso in the statute of Anne, that no protest shall be necessary either for nonacceptance or nonpayment, unless the bill is expressed to be for value received, and unless it is drawn for 20*l.* or upwards. Upon this last provision it becomes a question, whether bills under 20*l.* are excluded from all the benefits of a protest, and

cannot furnish any claim for damages and interest, or whether such a claim can be fully made without ceremony of a protest. Upon the whole, the latter seems the more accurate construction, though it is weakened by the accompaniment of bills not expressed to be made for value received, as these cannot be protested, and are not entitled to any benefit under the statutes.



CHAP. XVIII.

Of objections to the validity of bills and notes.

HAVING thus far considered the rights which belong to the holder of a bill of exchange, and the conduct which is necessary on his part to render those rights effectual, (supposing the instrument to be free from any legal objections) it is next proposed to examine the circumstances by which its validity may be destroyed or restrained. The principal articles upon this subject are an illegal consideration, and a want of consideration.

SECTION I. *Of illegal considerations and fraud.*

If a bill is given on an illegal consideration, such as the purchase of smuggled goods, the procuring an office, the compounding a criminal prosecution: so if it be fraudulently obtained; it is of no avail either to the original payee or to any person receiving it from him, with notice of its original defect. And if the several persons through whose hands it goes, are all privy to the illegality of the

original transaction, I conceive that such illegality would be clearly a bar to the holder. But if it has been received by an indorsee in the fair course of trade, and without any notice of the illegality, his right to recover against all, or any of the parties, will not in general be defeated; and by analogy to the decisions of courts of equity in the case of purchasers for valuable considerations without notice, the true conclusion seems to be that a person receiving a bill from such fair indorsee, even with notice of the original illegality, would be allowed to recover, for he succeeds to the rights and privileges of the indorsee, and those would be unduly restrained if he had not a complete and absolute power of transfer*.

How far the illegality of an original transaction affects subsequent contracts connected with it, is a question of great importance, and which does not appear to be distinctly settled. It was ruled, that where two persons were engaged in illegal stock jobbing transactions as partners, and having sustained losses, one paid the share of the other with his consent, and took his bond for it, the bond was a good security; for the person who advanced the money was not concerned in the use made of it by the other.—*Faikney v. Renous*, 4 Bur. 2069. Some years afterwards, on settling the accounts in a similar transaction, a balance being due to the broker Portis, for money

* This opinion is confirmed by the case of *Parr v. Ellison*, East. 92,

which he had advanced in paying the differences, Keble, one of the partners, drew a bill upon Hannay, the other partner, for his share of the balance in favour of Portis, the broker, which bill Hannay accepted. and the court of King's Bench decided that this case fell within the same principle; and Keble's executors having paid the amount to Portis it was ruled by the majority of the court of King's Bench that they were entitled to recover it back from Hannay, but Lord Kenyon strongly asserted the opposite opinion. The other judges were of opinion that the acceptance amounted to evidence that Hannay had consented, and requested Portis to pay the differences, and that it was the same as if Keble had originally paid the money to Hannay's use, with his privity and at his request.—*Petrie v. Hannay*, 3 T. R. 418. Subsequent to this, one Wilson was employed by Leshley, as a stock broker, in a similar transaction, and having paid money for the differences, there was a dispute respecting the amount. This dispute was referred to Steers and others, who awarded a certain sum to be due; for part of which Wilson drew a bill upon Leshley, and after it was accepted, indorsed it over to Steers. And it was decided that Steers was not entitled to recover against Leshley on his acceptance. Lord Kenyon said, that if he had lent the money to Leshley to pay the differences, and had afterwards received the bill in question for that sum, then, according to the principle established in the preceding case, he might have recovered. But

Here the bill on which the action was brought was given for those very differences, and therefore Wilson himself could not have enforced the payment of it; and as Steers knew of the illegality of the contract between Wilson and Leshley, he could not be permitted to recover on the bill in a court of law. Two of the judges were absent when this decision was made, and Mr. Justice Ashurst does not appear to have expressed any opinion on the subject—6 T. R. 61. This decision does not seem to be founded upon very satisfactory reasons. In the first place it may be incidentally observed that the award had created a new original duty, and could not any more than a judgment be impeached on account of the circumstances to which it related, furnishing no ground of action; and therefore Leshley was, at the time of subscribing the note, debtor, not upon the original consideration, but upon the award. I however do not mean to dwell upon this circumstance, because the point was not made, and possibly what is called an award, may have been merely the adjustment of differences. But supposing the award out of the case; it is agreed that if Steers had lent the money to Leshley for the payment of Wilson, it would have been a good ground of action; but in neither of the preceding cases was the money paid into the hands of the defendant; it was paid by his consent to the party entitled to the balance, (the illegality being waived) which was regarded as amounting to an immediate loan. But surely the advancing money to Wilson upon Leshley's

Ev.

O 2

acceptance, was at least equivalent to that. **R** Leshley had had a partner who drew the bill in favour of Wilson, and paid him the amount; the bill being receipted by Leshley, which testified his request for the payment, such partner would have been entitled to recover under the immediate and express authority of the case against Hannay. Whatever inference might be drawn from notice of the transaction, would apply most directly and pointedly between those who immediately participated in it, and whatever distinction can be made, must be in favour of the person receiving such a bill for a valuable consideration, and no wife implicated in the illegal circumstances, in respect of which the question arose. It was fairly argued at the bar that the bill was good in the hands of the broker, for it certainly was an avowal of the money being paid by him at the request of the defendant, which brings the case within the broad principle of the decision in *Falkney and Renous*.

In a subsequent case, the court acting upon the authority of the case of *Steers and Leshley*, refused a rule to shew cause in favour of the indorsee of a promissory note, given upon a settlement of differences; but the general argument was not entered into.—*Brown v. Turner*, 7 T. R. 630. If the observations suggested respecting the case of *Leshley and Steers* are correct, and the discussion of the subject is not precluded by the authority of these adjudications, as the last case de-

pends solely upon the preceding, it cannot materially vary the course of reasoning upon the general proposition.

In a case in Chancery before Lord Loughborough, his lordship held, that a person was not bound by his acceptance of a bill for money laid out on his behalf in effecting a void insurance upon an East India voyage, and referring to the cases of *Faikney v. Renous*, and *Petrie v. Hannay*, said, he was aware of those cases, but could not perfectly accede to them. What was called consent in those cases was a confederacy to break a positive law.—*Ex parte Mather*, 3 Vez. 573. But with every respect to the great authorities who have dissented from the principle of those cases, that principle seems to be supported upon the strongest foundations of justice. Where parties agree to contravene a legal prohibition, it is a necessary consequence that from such agreement no legal obligation can arise, but where the act is not in itself criminal, there is an honorary obligation which the party is at liberty to fulfil, and against the voluntary performance of which there can be no exception. If then admitting the force of the obligation he evinces a disposition to perform it; but for his own convenience persuades another to advance the money on his behalf, it is to every substantial purpose as much a loan of that money to himself, as if the money had been actually counted out to him, and he had paid it over. Having thus induced another to make an advance on his behalf,

there is no more justice in permitting him afterwards to impeach that act, than if money had been advanced by his request to a person whom he wished to assist, but to whom he was under no obligation either legal or honorary, and there is nothing in the policy of the law to relieve him from the undertaking to repay the money so advanced, when by the advancing it no illegal object was intended to be promoted. The different illustrations of Lord Mansfield in *Faikney* and *Renous*, all proceed upon the principle of a loan of money upon which the lender is not to be affected by the borrower's application.

It has been decided *at nisi prius* that a person, who at the request of the holder of a bill, has put his name upon it, and thereby been obliged to pay the contents to a *bona fide* holder, may recover the money paid, in an action on the bill, from any person whose name is on it, although he knew it was given on an illegal consideration—*Peake 117, Chitty 53.*

There are some instances in which, from the positive language of particular acts of parliament, the illegality of an instrument is a bar to the claim of a fair indorsee. Such has been decided to be the case with respect to bills drawn or accepted for a gaming or usurious consideration. The act against receiving money or any security for signing a bankrupt's certificate, is penned in terms equally strong, and would therefore receive the same construction; and there may in the range of the

statutes, be other provisions of a similar kind. But the indorsee may sue his indorser, who is in that, as in most other respects, considered as the drawer of an original bill.

It has been lately determined that the payee of a bill having indorsed it over upon an usurious consideration to another person, who paid it away and became bankrupt, and whose assignees afterwards received it in a course of payment, could not maintain an action of trover against the assignees. It was contended that no title could be derived through such usurious indorsement, but the court held, that as the bill was fair and legal in its concoction, no advantage could be taken of what happened afterwards against *bona fide* holders.—*Parr v. Eliafon*, East 91. It is to be observed, that the question in this case related to the property of a bill, indisputably good, against the drawer or acceptor, and that the decision does not reach the point of an action being maintainable at the suit of a *bona fide* indorsee, against the party who has before indorsed the bill upon an usurious contract.

SECTION II. *Of want of consideration.*

As between the immediate parties to a bill; the drawer and acceptor, the drawee and drawer, the indorsee and his immediate indorser; the want of consideration may be adduced as an exception. In these cases the acceptor, drawer, and indorser, have given the other party a power to pledge their respective credit, but have not entered into any

personal engagement. The holder of a bill (with these exceptions) has an absolute claim against all the parties, although he may know that no consideration was given to them, for they have enabled the person in whose behalf they have engaged, to carry their credit to market, and have in effect engaged as sureties for the payment of the bill in regular course, whoever may afterwards acquire a title to it. As between the immediate parties a consideration is presumed, and it is incumbent upon the person who alleges the want of it to substantiate that allegation by legal proof.

It may sometimes be a question of importance what shall be deemed an adequate consideration for this purpose. In the first place it may be taken for granted that any debt upon which an action may be maintained is sufficient. I also think that any injury may be compensated by such an engagement, the negotiable nature of the instrument rendering it a valuable property, though a mere naked promise on account of such an injury, would neither be the ground of an action or matter of defence, upon the absurd principle that it is merely substituting one cause of action for another. And it may be reasonably supposed that an honorary duty, such as the recompence to a barrister or physician, or a testimony of gratitude for any services not appreciable in their nature, but which may fairly admit of a complimentary retribution, will prevent an instrument from being impeached for want of consideration*.

* A person sued on a promissory note given to him in com-



CHAP. XIX.

Of altering a Bill.

A BILL originally good may be rendered void by any material alteration after it has issued. This was decided by the court of King's Bench, and their decision was confirmed in the Exchequer chamber, in a case which underwent very considerable discussion. Mr. Justice Buller being of a different opinion from the other judges.—*Master v. Miller*, 4 T. R. 310—2 H. B. 141. It had long been an established rule in respect to deeds, that if a deed be altered in a material part, even by a stranger, without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. In the

consideration of marriage, the marriage proved was contrary to the marriage act; but the jury having presumed a subsequent regular marriage, the court of B. R. would not grant a new trial; Mr. Justice Buller said, that a marriage in fact was, under the circumstances of the case, sufficient.—4 T. R. 468. In a subsequent case it was held, that no action could be maintained on a promissory note for an apprentice fee, the duty thereon not having been paid.—7 T. R. 121. A person who had lost a wager on account of the hop duties, gave a note to the winner; and it was held, that the illegality of the wager prevented a recovery on the note.—2 B. and P. 130. But the general question suggested in the text, has never been directly the subject of consideration.

particular case, the date of a bill payable three months after date, was altered after acceptance from the 26th to the 20th of March; by whom it did not appear, and it was resolved that the acceptor was not liable to pay the amount to a fair holder, but the obligation was utterly destroyed. It was ruled that the principle which had been before established respecting deeds, was applicable to bills. The reason of the law in either case is not very satisfactory. If a child tears off the seals of a deed, or throws it into the fire, and the former contents can be sufficiently proved, the obligation remains; but if one person wantonly *alters* the writing of another, the right of the person interested is without any criminality on his part destroyed. The authority of the decision which has been cited, will probably be deemed conclusive, it having received the concurrence of so great a majority of the judges. I may perhaps have already incurred too frequently the charge of presumption in opposing the suggestions of my own mind to the weight of judicial opinions. Upon the present subject I cannot forbear observing that though the conclusion of Mr. Justice Buller was over ruled, and may therefore be deemed erroneous, his argument furnishes a greater share of professional instruction, and a more admirable specimen of judicial reasoning than can often be found in an equal compass.



CHAP. XX.

Of passing a bill after it is due.

IT having been already stated that in order to charge the drawer or indorser of a bill, it must be presented when due, it is a necessary inference that any negotiation afterwards cannot affect those parties (except possibly under the special circumstance of the drawer receiving the appropriated funds from the drawee.) The acceptor is liable under his general engagement to whoever may at any time receive a legal title; but it has been held in several cases, and may now be stated positively as law, that a person who takes a bill after it becomes due, takes it under suspicious circumstances, and subject to every objection which might be admitted against the person from whom he receives it. Lord Kenyon entertained strong doubts upon this subject recently after his appointment to preside in the King's Bench: but he has since frequently testified his acquiescence in the sentiments entertained by other judges.

A person who himself passes by indorsement a bill after it is due, cannot object that circumstance against any indorsee; but it cannot be supposed that this shall create a responsibility to be continued to any definite period. It should be considered as equivalent to a draft payable upon demand, and

Ev. P 2

unless presented in reasonable time, the holder should be subject to the loss arising from the failure of the drawee.

Where a bill has been returned upon the drawer for nonpayment, he cannot afterwards negotiate it so as to charge the acceptor with an action on the bill at the suit of the indorsee—*Beck v. Roblëy*, 1 H. B. 1589.



CHAP. XXI.

How obligations arising from bills of exchange may be discharged.

WE are next to consider the modes by which the obligations arising from bills of exchange may be discharged. The first and principal of these is payment. This subject is divided by Pothier into the following heads. 1. To whom the payment may be made. 2. By whom it should be made. 3. When and at what rate.

In respect to bills generally indorsed, the course of business is to pay them to any person by whom they may be brought, as the possession implies a sufficient authority for the purpose; but if a bill is stolen or lost, and notice is given to the drawee to withhold the payment, he should do so, being indemnified in case he has given his acceptance: the *bona fide* holder of such a bill is entitled to receive the amount, but the loser is fairly entitled

to litigate the question, whether the person making the presentment possesses that character. Where a bill has not been indorsed by the payee, or is only specially indorsed, the payment can only be made to the person expressly designated, or any agent acting under his authority, or to those who have legally succeeded to his general rights, as in case of a bankruptcy, to his assignees, in case of death, to his personal representative; in case the payee or special indorsee is a woman who has in the mean time married, to her husband; but if the drawee is not privy to the bankruptcy or marriage, payment to the person originally designated is sufficient.

In case the bill is stolen or lost, and a person who presents it for payment, assumes the name of the payee, or if his name has been forged upon the instrument, though the person presenting it or committing the forgery may have the same name with the real payee; and although such payee may not have been specially described, it is no discharge; the real owner does not lose his property; and the drawee cannot charge the drawer with what he has paid under these circumstances—*Smith v. Shepherd*, Chitty, 226—*Mead v. Young*, 4 T. R. 28.

A promissory note was discharged by the bail of the drawer, and the indorsee afterwards sued the indorser for their use, but it was properly decided that this was in effect the payment of the drawer

himself, and consequently a discharge of all the other parties—Wils. 46.

The payment may be made by the drawer, or any person by his authority, or in case the bill is dishonoured, by any person for the honour of the drawer or indorsers. The payment last mentioned will be a discharge to all deriving a title under the person for whose honour it is made, but will give the party paying a right of indemnity against that person, and all who were answerable over to him, as we have seen in a former part of the essay where the subject was discussed at large.

The time of payment is upon the last day of grace, if the bill is payable at any certain period after date or sight. Whether days of grace are allowed upon bills payable at sight, is, as has already been observed, a disputed question.

There is a decision that a person having received on the 17th——, a banker's check, dated on the 18th——, and the check having been lost, and presented for payment on the 17th——, the bankers were not discharged, as it appeared to be contrary to the regular course of business, to pay such checks before the day of their date—Esp. 40.

Where a bill is made payable in a foreign country, in foreign coin, the value of which coin is reduced by the government of that country, it has been said that the bill shall be payable accord-

ing to the value of the money at the time it was drawn—Skin. 272—Chitty 154.

The obligation arising on bills may also be extinguished by a release or acquittance. The holder being entitled to the respective credits of all the other parties for the same sum, may, as a necessary consequence of this right, give a discharge to any of them: but a discharge to the acceptor, either before or after the bill becomes due, is a complete extinction of all the credit under the bill, and the bill has no longer any legal operation, at least so far as respects the rights of the person giving the discharge.

Pothier says, that if the discharge is given by letter to the acceptor, the holder retaining the possession of the bill, and it is afterwards indorsed to a third person for a valuable consideration, he does not think that the acceptor can resist the claim of the indorsee, who presents it when it becomes due, but is left to his remedy against the person who had indorsed it in contravention of his release. He states his reasons for that opinion at large, which it will be unnecessary to cite; the reason of the thing is obvious; and according to the law of England there could be no doubt that the fair holder of a bill cannot be prejudiced by such a secret transaction. We have already seen that a person receiving a bill after it is due, only succeeds to the rights of the person from whom he receives it, and is subject to the same exceptions, such a transfer being contrary to the regular course of business. Pothier

adds, that a release can only take effect from the concurrence of intention in the persons giving and receiving it, and therefore it may be revoked at any time before it is fully communicated. It is also void in case of the death of either party before such communication. I rather think that according to the law of England, acceptance would be presumed immediately upon the transmission, until an express dissent was shewn.

The same writer enquires how far the drawer can take advantage of a release to the acceptor before the bill is due, so as to preclude the acceptor from charging it in his accounts to the drawer, (premising it to be clear that the drawer is discharged from all responsibility as warranting the payment of the bill), and he refers to the distinction which is taken in the law respecting mandates, that if the release is made for the sake of the acceptor, and in recompence of any services from him, it is considered as equivalent to a payment by him to the holder on account of such services, being a sufficient compensation, at least according to the principles of natural obligation; and that in such case the drawer is chargeable in account to the acceptor, but if the release were purely gratuitous, the acceptor not having contributed any thing in lieu of it, he cannot charge it in account, according to the principle that a surety cannot require more from his principal than he has actually paid. I cannot but doubt the proposition, for the acceptor is not regarded merely

in the light of a security for the drawer, but as a person having in his hands a given sum of money appropriated to the payment of a bill and the drawee has no claim to any benefit from a donation of that sum by the holder to the acceptor. But questions arising from mere donations, are not likely to be the frequent subjects of forensic discussion.

He next discusses the subject how far a discharge to the acceptor, after the bill is dishonoured for nonpayment, is a discharge to the drawer and indorsees : and first distinguishes between a real and a personal release, observing, that if the holder declares to the acceptor that he considers the bill to be discharged, or if he gives an acquittance without receiving the amount, it is beyond all controversy a liberation of all the parties.

Where the discharge is only personal to the acceptor, as if the holder writes that he discharges him from all responsibility, a further distinction must be made. If the acceptor has received effects from the drawer, and consequently was bound to indemnify the drawer from any action upon the bill, the release will operate as a discharge to the drawer and indorser, either for the whole, if the drawer had remitted effects for the entire payment, or for the part which he had remitted, if less than the whole, for otherwise the acceptor would not enjoy the benefit of his release. But if the drawer had no effects in the hands of the acceptor the release by the holder to the accep-

tor would not liberate the drawer, or deprive the holder of his right to sue him either for the whole or the deficiency, for in this case the claim would not recur upon the acceptor; but in both cases the indorsers would be discharged, because it is the drawer only who is bound to place effects in the hands of the drawee.

He then states that if three-fourths of the creditors of the acceptor agree to a composition (which in France was obligatory upon the other fourth part) the giving a release by compulsion as being one of the remaining fourth part of the creditors is not a discharge to the drawer or indorsers, for the release is not voluntary, and they would have been equally obliged to accede to the composition.

These distinctions are in a great degree supported by the decisions of the English courts, according to which, if the holder gives any indulgence in point of time, or otherwise to the acceptor, it is a liberation of the drawer and indorsers, for they, by paying the bill, may be substituted to all the rights of the holder, and if such rights could be defeated or abridged by the indulgence given to the acceptor, it would be an undue prejudice; therefore if the holder takes a bond from the acceptor (which is an extinction of the right of action upon the bill) if he receives a composition, or in any other mode voluntarily diminishes the responsibility of the acceptor without the consent or authority of the other parties, it is an exoneration

to them. Lord Thurlow decided this in a case where the indorser of a promissory note was a bankrupt, and the holder having proved a debt on his estate, received a composition from the maker. He said he was satisfied that Sir James Esdaile, the holder, did in fact make the best terms he could with the drawer of the note, by taking from him 15s. in the pound in full. And whatever difficulty he might find in making a precedent, which allowed of such a composition, without giving notice to the assignees of the indorser, he was convinced that the justice of that particular case, if it stood alone, would not require him to expunge that debt from the proofs against the indorser's estate. The case made did not impute any fraud to the transaction of the composition; but on the contrary the holder used all diligence against the payer of the note, and then made the best terms he could with the maker, though at the same time he had gone to the extent of exculpating him altogether, in respect of the note. However, whatever might be the circumstances of the present case he thought in point of precedent it might be dangerous to say, that after such an acquittal the holder might resort to the indorser's estate. This certainly operates to this kind of fraud, that when the holder sees that in one way or other he shall be sure of his 20s. in the pound, he may favour an acceptor at the expence of an indorser, by compounding with the acceptor for just so much as he conceives will be the deficiency under the indorser's commission. In this view it might be

a dangerous precedent, and he cured this danger by saying generally, that the holder of paper shall not compound with the prior names on the bill, but on the consent of the assignees of the posterior party. And it is not an answer to say, that if any fraud is practised in the composition, that shall take it out of the general rule. It is much better and more convenient in practice, to have a precise rule to go by, and justice will in general be better done to all parties. The debt is well proved upon the indorser's estate; this gives the assignees a right of action against the acceptor or drawer for the amount paid out of the indorser's estate, but this right is cut away by the composition, and discharge given to the acceptor by the holder. Therefore it is better to say, "Let the assignees either take the whole, or permit the holder to make the most of it he can against the acceptor.—*Ex parte Smith*, 3 Bro. Ch. I. It was afterwards decided by the same great authority, in conformity to the doctrine above stated that the holder of a bill, accepted by a person having no effects, did not relinquish his right against the drawer, by taking security from the acceptor and giving him time.—*Ex parte Holden*, Cooke's Bank. Laws.

Although the acceptor has received no effects, and therefore the drawer is, as between themselves, the person who is to discharge the bill; as the acceptor is primarily the debtor of the holder, he cannot even in such a case object to any laches in

the holder, or insist that, by endeavouring to obtain the money from the drawer, he has waived his claim against himself as acceptor. But any express agreement, or any intimation of the holder's intention to discharge the acceptor under these circumstances, will be sufficient for the purpose. What shall be deemed a sufficient evidence of intention, is a question of fact, which depends in every case upon its own particular circumstances. The cases upon the subject are collected in Mr. Douglas's Reports, p. 247.

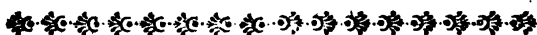
Where the holder gives a release to the drawer it enures in favour of the indorsers, and in general, according to the opinion of Lord Thurlow already cited, a release to, or composition with a prior party, precludes the holder from all recourse against those who are posterior. But a discharge to the last indorser will not operate in favour of the preceding, or of the drawer or acceptor; nor in general will the release to the drawer discharge the acceptor: but Pothier decides, that if the acceptor has no funds, he may avail himself of the release to the drawer, otherwise, the drawer being answerable over, would not receive the benefit of the release. It must necessarily be implied, that the holder has notice of the nature of the bill.

But if the holder takes a prior indorser in execution, and afterwards liberates him from custody, it is no discharge to the subsequent indorser.—2 Bl. Rep. 1235. Perhaps the first would not, un-

der these circumstances, be discharged of his liability to indemnify the sublequent indorser.

The right of the holder of the bill may also be extinguished by way of compensation or set off; if he is debtor in an equal sum to the acceptor, or any other person whom he sues thereon; but the French law differs materially from that of England in respect of this point. By the former the concurrence of the debts at the time of the bill becoming due, operated in itself as a mutual liquidation. With us the mutual debt is only a ground of defence, especially introduced by modern statutes. And applying it as a set off, is merely optional in the person who is sued.

Pothier refers to two other ways by which a bill of exchange, or any other obligation may be extinguished. Novation, or the accepting a different engagement in lieu of the former, and confusion, where upon the decease of the holder the acceptor becomes solely entitled to his property, or *vice versa*, the characters of debtors and creditors being purely and simply united in the same person, the obligation is necessarily destroyed. I shall forbear, on account of the length to which the present essay is already extended, dwelling upon either of these subjects.



CHAP. XXII.

Of miscellaneous incidents respecting bills and notes.

THUS far we have taken a view of the doctrine respecting bills of exchange, as applicable to the rights of the holder against the drawer, indorsers, and acceptor. The topics remaining for discussion are the effects of passing such a bill without reference to the obligations arising from those characters, the rights acquired by payment to the holder of the bill, and the distinction between the several kinds of instruments that are comprized within the general subject of the essay.

If a holder of a bill transfers it without indorsement to another person, who gives it a further circulation, such holder is not under any legal obligation, except to the person immediately receiving it from him. As between himself and that person it was once held, that taking a note for goods sold at the time, was a payment, as being part of the original contract; but that paper was no payment of a preceding debt.—1 Lord Raym. 930. But it is now settled, that if the seller of goods agree to take bills as payment, and to run the risk of their being paid, it would be considered as payment, whether the bills had, or had not, been afterwards paid; but without such agreement the

giving of such notes is no payment.—7 T. R. 66. Harrison and Co. employed F. H. to carry a bill to market, and get cash for it; and that person having applied to J. H. to get it discounted, informing him that it was the bill of the principals, that though they did not choose to indorse it, as their number was on the bill, it was equivalent to an indorsement; and that he F. H. would indemnify J. H. J. H. indorsed the bill to Fenn, and received money for it, Fenn not knowing at that time that Harrison had any thing to do with the bill. The bill not being paid, Fenn was allowed to recover from Harrison the money which he had advanced. There was indeed a promise of payment, but that was considered rather as an evidence of the authority originally given to F. H. than as the immediate ground of action—4 T. R. 177. In a former cause between the same parties, there was evidence that Harrison particularly told F. H. that they would not indorse it, and the majority of the court of King's Bench were of opinion that that was only an authority to sell the bill without pledging their credit—3 T. R. 757. Viewing this case as unconnected with any question respecting the authority of F. H. the inference seems to be, that a person receiving cash for a bill, though *without indorsement*, is under an implied promise to refund the cash if the bill is not duly paid; but if he refuses to indorse the bill, or in any manner intimates his intention of selling his interest in it without subjecting himself to any

Further responsibility, the bill is at the risk of the purchaser.

The acceptance of a bill, or the giving a promissory note, is a good payment of an antecedent debt—*Vi. Kearlake v. Morgan*, 5 T. R. 513—*Richardson v. Rickman*, cited *ibid.* If they are not duly paid, they are considered as a nullity, but no action can be maintained upon the original demand, until they have become payable. If a bill or note of any other person is given in payment and honoured, it is a discharge; but a person who was arrested having given a draft which was refused acceptance, the drawer not having any effects, was arrested again upon the same writ, whereupon Lord Kenyon gave the following opinion. In cases of this kind, if the bill which is given in payment, do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it as nullity, and act as if no such bill had been given at all. These questions have frequently arisen at *nisi prius*, where they have always been determined the same way—I remember one in particular, where a rider in the country gave a draft on a person in London, with whom he had no connection whatever. And it was admitted on all hands, that it ought to be considered as if no such bill had been given at all, and that the original debt remained in force—6 T. R. 54.

In a case which occurred before Lord Ch. Justice Holt, a person who received a bill on account of

a prior debt, kept it in his hands a considerable time after it became payable; and his Lordship held, that such bill should be no discharge of the preceding debt, unless the money was actually paid—Salk. 129. The statute of 3 and 4 Ann, provides, that if any person accept such bills as had been referred to in the preceding sections, in satisfaction of a former debt, it shall be accounted a full payment, if the person accepting it does not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest either for nonacceptance or non-payment. This clause only extends to the inland bills, which we have already considered as being the subject of a protest; but the general distinction no longer subsists, and Mr. Chitty seems to be correct in his opinion, that the alteration of the law is rather to be ascribed to the change of opinion in our courts of justice than to the mere authority of the statute. A decision of the court of Common Pleas strongly confirms this observation. Delarive being indebted to Chamberlaine, gave him a note upon H. desiring him to pay the amount a few days after date. He held the note four months without making any demand, when H. stopped payment; the jury found for Chamberlaine in an action for the debt; for the note not being payable to order, they looked upon it as not a negotiable bill of exchange or draught; but it was said by the court, that the plaintiff by accepting this note or draught undertook to be duly diligent in trying to get the

money from H. and to apprise the drawee if H. failed in payment. Chamberlaine substituted himself in the place of the drawer, who had been deluded into a belief that the money had been gotten from H. The common law detests negligence and laches : there is no reasoning applicable to the case of holding a bill of exchange that is not applicable to this case. The plaintiff by holding this order four months, hath discharged the defendant of his debt, and credited H. in his stead and place, if this verdict should stand, it would be mischievous ; if a jury can say that a man may hold such a draft or order as this ten weeks after it is due, they may as well say he may hold it ten years. Here appears to be gross negligence, and we think the jury shall not pronounce the law in such a case as this [is.—2 Wils. 353. In a more recent case which was tried before Mr. Justice Lawrence, at Lancaster, Backhouse gave Gregsons in payment of a debt, a check upon Caldwell and Co. directing them to pay the amount in a bill at two months. It appearing that there was negligence in the presentment of the check (with regard to which the case will be again referred to presently) it was held to be a sufficient discharge.—Lanc. Sum. Ass. 1795.

The following case, which arose on a similar check, may be also properly introduced here : Richard having purchased goods of Bolton, to be paid for in a bill at two months, gave him a check upon Caldwell, for such a bill. The check being

Ev.

R. 2

carried to Caldwell, with whom both the parties had banking accounts, he credited Bolton, and debited Richard with the amount, calculating interest on both sides to the day on which the bill would become due, and kept the check. Previous to the time that the bill, if given, would have become due, Caldwell failed, being considerably indebted to both the parties. The court of King's Bench decided, that under these circumstances Richard was discharged from the price of the goods, that when the parties settled their different accounts, Bolton considered Caldwell as his debtor; the settlement of the interest accounts with the different parties, was considered by Lord Kenyon as decisive. Mr. Justice Grose said, it was as if Bolton had discounted the check with Caldwell, and then deposited the money with him as his banker. Richard's books being debited with the amount, also shewed that this was the transaction between the parties. And Mr. Justice Lawrence said, that the justice of the case was certainly with Richard. If Bolton had received a bill from Caldwell, which he ought to have done, the account between Bolton and Richard would be closed, if that bill had been drawn on a solvent person; but it appears, from the books of both the parties, that it was agreed between them, that instead of waiting the time appointed for payment of the bill, Bolton should be immediately paid by a transfer of so much money in the hands of the banker from Richard's to his account, deducting the interest of the amount to that time: all the parties consider-

ed the money as paid at that time.—6 T. R. 139. The decision of this case must have been the same if Richard had actually given a bill drawn upon Caldwell, which Bolton had paid over to Caldwell receiving credit in account; and thereupon Caldwell had cancelled the bill or retained it till his failure. Bolton having passed it away, and received value by the credit in account, could have no claim upon Richard for the preceding debt, unless the bill was returned upon him. But it could never have been so returned by Caldwell, the acceptor, or his assignees. The transaction between Caldwell and Bolton, was (in the language of the civil law) a novation; and the receiving a distinct engagement in satisfaction of the preceding duty.



CHAP. XXIII.

Of the rights acquired by payment of a bill or note.

THE indorser of a bill or note, by paying the value to a subsequent party, acquires all the rights which are incident to the character of the holder; but immediately upon receiving notice of the bill being dishonoured, he must give a regular notice in the same manner as is incumbent on the holder. If the notice has actually been given by the holder or any indorser, it enures against the person who has received it, to the benefit of all the intermediate parties. The right of every indorser to recover the amount of what he has paid for re-ex-

change, though the several returns, has been already mentioned.

The drawer has a similar claim upon the acceptor, provided he has remitted funds for payment; but on the other hand, a person who has accepted without effects, may recover the amount of what he consequently pays from the drawer, and in like manner, every person accepting or paying a bill for the honour of any of the parties, has as against them, and all the antecedent parties, a claim to be reimbursed.

Although an acceptor is taken in execution by the holder of the bill, and discharged under an insolvent act, he may be afterwards sued by the drawer or indorser who have paid the amount, as it is a new cause of action, 4 T. R. 825.



CHAP. XXIV.

Of Promissory Notes.

THE affinity between bills of exchange and promissory notes, has been frequently referred to in the course of our progress. The introduction of promissory notes into commercial transactions, was much more recent than that of bills of exchange; and they were the subject of considerable controversy; Lord Chief Justice Holt being unwilling to allow them any intrinsic validity, and considering them only as evidence of a debt. Conse-

frequently, as a general rule, an indorsee had not any recourse against the drawer or any of the indorsers, but him from whom he received it. The merchants struggled resolutely against this opinion, and at their instigation the statute of 3 and 4 Anne, was passed, which recites, "it *had been held* that notes signed by the party who makes the same, whereby such person promises to pay unto any other person or order, any sum of money, were not assignable or indorsable over; and that actions could not be maintained by the payee or indorsee, according to the custom of merchants," and provides, that "all notes promissory to pay any person or body corporate or order, or to bearer any sum of money mentioned in such notes, shall be construed to be payable, to any person to whom they shall be made payable, and shall be assignable and indorsable over, in the same manner as inland bills of exchange. And the indorsee may maintain an action thereon in like manner as in cases of inland bills of exchange. And the plaintiff in such action shall recover his damages and costs.

Pothier referring to a billet *a-domicile*, defines it to be a billet by which I oblige myself to pay to you, or your order, a certain sum, at a certain place by the hands of my correspondent. "This contract (he observes) is of the same nature with a bill of exchange, but differs from it in form. A bill of exchange ought to be accepted by the drawer, who becomes the debtor by his acceptance, and the drawer is only put a garrantee for the payment. On

the contrary, when I give a billet, payable *a-domicile*, I am the only debtor; my correspondent, at whose house I promise to pay, is only a person indicated by me, by whose agency the payment will be made; and therefore it is not to be presented to him for acceptance. These billets amongst merchants, give the holder when they are not discharged, the same rights which belong to the holder of a bill, and require the same degree of diligence."

The only difference between the billets mentioned by Pothier, and our promissory notes, is, that the latter are not necessarily payable at any particular place: their character was accurately designated by Lord Mansfield, in a case where the question before him was, whether the indorsee of a bill of exchange could recover against the indorser without making a demand upon the drawer, (the necessity of making a demand upon the drawer of a promissory note having been fully established.) Having expressed the opinion of the court that such a demand was not necessary, he said, "The law is exactly the same, and fully settled upon the analogy of promissory notes to bills of exchange, which is very clear when the point of resemblance is once fixed. While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed, the resemblance begins; for then it is an order by the indorser, upon the maker of the note, (his debtor by the note) to pay the indorsee. This is the very defini-

tion of a bill of exchange. The indorser is the drawer, the maker of the note is the acceptor, and the indorsee is the person to whom it is made payable. The indorser only undertakes, in case the maker of the note does not pay. The indorsee is bound to apply to the maker of the note: he takes it upon that condition, and therefore must, in all cases, know who he is, and where he lives; and if after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money, and cannot come upon the indorser at law. Therefore, before the indorsee of a promissory note brings an action against the indorser, he must shew a demand, or due diligence, to get the money from the maker of the note, just as the person to whom the bill of exchange is made payable, must shew a demand, or due diligence, to get the money from the acceptor before he brings an action against the drawer; so that the rule is exactly the same upon promissory notes as it is upon bills of exchange, and the confusion has, in part, arisen from the maker of a promissory note being called the drawer; whereas, by comparison to bills of exchange, the indorser is the drawer.—*Heylen v. Adamson*, 2 Bur. 669.

The writers on this subject having generally been of opinion that days of grace ought to be allowed on promissory notes, the question when brought regularly before the court of King's Bench was decided in conformity to that opinion. Lord Kenyon said, "It is not necessary now to

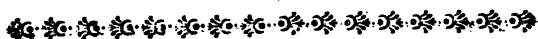
consider whether or not Lord Holt was right in so pertinaciously adhering to his opinion before the statute of Anne, that no action could be maintained on promissory notes as instruments, but that they were only to be considered as evidence of a debt; that question exercised the judgments of the ablest men at that time, but the authority which his opinion had in Westminster Hall, made others yield to him, and it was thought necessary to resort to the legislature to apply a remedy. It is extremely clear, that on foreign bills of exchange three days grace are allowed. I think it is as little to be doubted that they are also to be allowed on inland bills, and that observation is of some use, as applicable to some of the authorities that have been cited. It is not too much to say, that in former times, recently after the passing of the statute of Anne, these questions were not so well understood as they have been since; the judges were not so conversant with the subject, but they have now raised a system to answer the exigencies of the public without departing from the rules of law. But when it is stated in Lord Raymond that there was no certain time assigned by the custom of merchants, for the payment of inland bills of exchange, it only shews that the judges were very cautious upon the subject; but now it has been settled for more than half a century, that they are payable at the same time as foreign bills of exchange. Then it has been argued, that there is a substantial difference between bills of exchange and promissory notes, and that there

the reasons why the acceptor of the one should be allowed more time than the maker of the other; but I confess I see no difference whatever; they both make engagements of the same nature, and when the acceptor has accepted a bill, he is equally bound to be prepared on the day appointed as the maker of the promissory note. Then the ground in which our judgments must proceed is the statute of Anne. The words of the preamble ought to decide the question, which the common usage of mankind has since put in a state of repose. It states, that the enactment is to encourage trade and commerce, which will be much advanced if such notes shall have the *same effect as bills of exchange*, and shall be negotiated in like manner. The operative part proceeds to say that they shall be assignable and indorsable over *in the same manner as bills of exchange*, and that the holders may maintain the same actions upon them *in such manner as they might upon inland bills of exchange against the drawers*, or against the indorsers *in like manner as in cases of inland bills of exchange*. A case cited is undoubtedly against our opinion, but that case was determined when the doctrine of paper currency was not so well established as it has been since, and it has been constantly contradicted by the uniform practice to this time, and by the courts of law. A late case is very important*. It was argued several times upon other points; but this question was not even raised, though it would have been decisive if well founded, and it was

* *Tindal v. Brown*, 1 T. R. 171.

taken for granted in all the stages of the cause, that the laches of the holder did not commence until the expiration of three days grace. In addition to these considerations it now appears to have been the constant practice at the bank, and at the principal bankers, to make this allowance on promissory notes. Then if we were to make a decision in opposition to all this practice, it would be attended with the most serious consequences, for these notes are circulated not only through this country, but also over several other countries in Europe. Many of them have been discounted and interest taken, on the supposition that three days grace are allowed; but if it were to be determined, that no such allowance ought to have been made, all those parties would be involved in the crime of usury. And again, all holders of notes who made no demand on the makers till the expiration of three days, and who afterwards resorted to the indorsers, will have been guilty of laches." The other judges expressed a similar opinion. Mr. Justice Buller observed that several cases cited in support of the opposite proposition, only shewed how little the law on this subject was formerly understood; but whenever these kind of cases have been discussed of late years, the judges have all agreed, that it is essential to the welfare of the trade and commerce of the country that some certain rules should be established to govern all cases in future—4 T. R. 128. In a later case, a promissory note payable upon a contingency, was contended to be good as a negotiable instrument:

(its validity as a mere contract, not being disputed) but it was truly said, that it was to answer the purpose of commerce that those notes were put by the statute on the same footing with bills of exchange. Then they cannot rest on a better footing than bills of exchange, but must stand or fall by the same rules by which bills of exchange are governed—5 T. R. 485.



CHAP. XXV.

Of bills or notes payable to bearer, and herein of fictitious payees.

WHERE a bill or note is made payable to a certain person or bearer, or to bearer generally, it passes without indorsement, and whoever fairly acquires a right to it, may maintain an action against the drawer or acceptor. If it is in fact indorsed, the indorser is in this as in other cases, chargeable as an original drawer.

It will not be necessary to make any particular observations respecting bills which purport upon the face of them to be payable to bearer; but much discussion has taken place with regard to bills expressly made payable to a nonexisting person, and, which, under certain circumstances, are held in legal effect to be payable to bearer.

Where a bill is made payable to the order of an

existing person, the indorsement of that person is essentially requisite to charge the drawer or acceptor, and must be proved as a part of the holder's title.

The indorsement being equivalent to the drawing of an original bill, no exception can be taken by the indorser to the previous want of indorsement by the payee. His general indorsement renders him liable to the demand of subsequent holders in the same manner as the drawer of a bill payable to bearer. Consequently it can never be matter of defence to him that the bill was originally drawn payable to the order of a nonexisting person.

But the acceptor of such a bill cannot be charged in the manner which the tenor of the bill imports, for want of an indorsement by the payee; and therefore if he is liable at all, it is by considering the bill as made payable to bearer.

Paper of this description having issued to an immense amount, about the year 1788, several of the persons engaged in promoting a fictitious credit, became bankrupts, which was the occasion of the public attention being particularly called to the subject. Lord Mansfield had long before given a decision, that the acceptor of such a bill was liable to pay the amount to the holder, having expressly made a promise of payment at the time when he discounted the bill. In the first case which came solemnly into discussion, Harris and Co. drew a bill upon the same Harris, payable

to the order of Grigson and Co. and paid it with the fictitious indorsement of Grigson and Co. to Lewis and Potter, for which they received value. The action being brought against Harris by an indorsee of Lewis and Potter, it seemed to be agreed that the demand could not be sustained as upon a regular bill, payable to order. And the court of King's Bench declined giving an opinion whether it was to be considered as a bill payable to bearer. But Lord Kenyon said, the decision proceeded on the special circumstance that Harris, at the time of entering into the engagement, knew that there were no such persons as Grigson and Co. and therefore in point of formal derivation of title, that which is usually done could not be done; and referring to a former opinion of Mr. Justice Yates, that giving a bill payable to bearer, is, as it were, an assignment of so much property, which becomes money received to the use of the holder of the bill, he said, upon that doctrine is founded the decision of this case. For here Harris being a debtor of Lewis and Potter's, drew a bill which he delivered to them, and drew it in terms which could not be proved in a formal manner; he was not only privy to the transaction, but the very negotiator of it, and by drawing it, he put himself in a situation to pay what he was in conscience bound to pay. Therefore it was an appropriation of so much money to be paid to the person who should become the holder of the bill. The court considered it as an agreement between the parties to appropriate so much property to be carried to the

account of the holder of the bill.—*Tatlock v. Harris*, T. R. 174. On the same day there was another case, in which a third person drew on the defendants who accepted the bills, and a distinction was endeavoured to be made from the preceding case, by its not appearing that the defendants had received any value for the bill. The court were of opinion, that the plaintiff might recover as upon a bill payable to bearer, there being sufficient evidence to support the inference that the acceptor knew that the bill was made payable to the order of a fictitious person.—*Vere v. Lewis*, 3. T. R. 182.

The subject next came before the court of Common Pleas in an action against the drawer; and they were of opinion that the bill was in point of legal operation payable to bearer. Lord Loughborough said, “It certainly is not *literatim* payable to bearer, it is payable to G. C. or order, and when a security is negotiated, which, by the terms of it, the party receiving it apprehends he has a clear right to recover, and by the insertion of the name of a fictitious person, his recovery is impeded (it being impossible to prove the order of a person who had no existence) it should seem in point of law precisely the same as if it had been made payable to bearer. A bill of exchange is an authority to pay pursuant to the order of the payee, and it is also an undertaking to pay pursuant to that order. But if there be no person who, by any possibility can give such order, the engagement must be to pay the bill. If the order, of

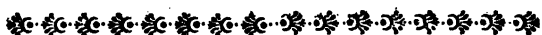
the person cannot be procured, and with the knowledge and privity of the parties who made the bills, such a name is put in as cannot give an order, it is in effect, and in point of law the same thing, as if they had made it payable to the person who held the bill, namely, the bearer.—1 H. B. 321.—*Collis v. Emmett*.

Afterwards the subject underwent a very solemn discussion before the House of Lords, in an action against the acceptor, who knew that the bill was fictitious at the time of his acceptance. Subsequent to the indorsement in the name of the fictitious payee, there was a second indorsement by the original drawer, upon which some stress was laid; but the principal ground upon which the majority of the judges, in concurrence with Lord Bathurst, gave their opinion, and which was adapted to the decision, was, that as the drawer and acceptor knew that it could not take effect in its literal form as a bill payable to order; the construction ensued that they meant it should be payable to bearer, as being the only way in which in its original formation it could take effect, and oblige them as a bill of exchange. The liability of the acceptor was controverted by Lord Chief Baron Eyre, Mr. Justice Heath, and Lord Chancellor Thurlow. The general ground of their opinion was, that there must be a certain form of words used in bills payable to order, and a different form in bills payable to bearer, that it must appear clearly on the face of the bill whether it be a bill payable to order, or a bill payable to

bearer, that the value of the writing, the assignable quality of it, and the particular mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill of exchange is tendered, need look no further, and has nothing to do with any private history that may belong to it. The several arguments in support of these opposite opinions, are stated in Mr. Henry Blackstone's Reports, and Mr. Kyd's Treatise on Bills. I reluctantly forbear swelling this essay to a disproportionate extent by inserting them, but cannot too strongly recommended their perusal to all who are engaged in juridical studies. The question, whether the giving utterance to the fictitious indorsement did not constitute a forgery, which would merge the civil remedy in the crime, was a ground of some observations, but the intent to defraud, which constitutes the essence of the crime, not appearing judicially in the cause, this point was not implicated in the decision. But as it was strongly intimated that indorsing a fictitious name in order to obtain credit, did constitute a forgery; and as there have been some convictions founded upon this principle, an effectual check seems to have been given to the practice, though all the mischiefs of a forced circulation equally result from the actual signature of persons not possessing substantial property.

The knowledge of the acceptor, that a bill is fictitious, or his general authority to draw bills of

that description, may be inferred from a variety of circumstances, and is in every case a question of fact. His responsibility in the character of acceptor, is founded wholly upon such knowledge or authority. The drawer must necessarily be privy to the circumstance, arising out of his own act; his liability therefore may be stated as an universal rule. We have already seen that the obligation of the indorser to his indorsee, is perfectly independent of any relation to the existence or non-existence of the payee; or, (admitting the payee to be a real person) of his having actually given his indorsement to the bill.



CHAP. XXVI.

1. *Of bills and notes not payable to bearer or order.*—2. *Bankers Checks.*—3. *Bank Notes.*—4. *Bills and Notes for less than 5l.*

I. It is now established that a promissory note is valid, and may without specific consideration appearing, be made the ground of an action, although it is made payable to a certain person without adding *to his order or to bearer*, and that the person making such a note is entitled to three days grace.—6 T. R. 124. From the complete analogy which subsists between bills and notes, it must be inferred that an order upon James to pay a sum of money to John, is entitled to the same character; but these instruments are not negotiable; and

though it is not incumbent on the person to whom they are given to shew a consideration, it is evident that like the regular negotiable instruments, the right of the payee may be defeated by shewing that in fact there was no consideration.

II. The common checks drawn by a person on his banker, payable to bearer, do not express any time of payment, and consequently are payable upon demand. If these checks are not presented in a reasonable time, and the banker on whom they are drawn afterwards fails, the loss falls upon the holder; but according to the observation formerly suggested, I think he ought to be allowed the benefit of proving on the banker's estate, or of suing him in the name of the drawer. There has been much contest respecting what shall be a reasonable time for this purpose, and it is perhaps not fully settled whether it is a question of law or fact. But it seems to be the general, and certainly it is the most reasonable opinion, that when the parties reside in the same place, a presentment at any reasonable time on the day after the check is received, is sufficient, and that a longer period is unreasonable. The maxim of law which says, that there shall be no fraction of a day, and which considers the whole day as one instant of time, except where it is necessary to distinguish a relative priority between different acts or events, is founded upon good sense; it removes the difficulty and uncertainty which must in many instances attend a more particular enquiry, and being applied to the case

before us, gives a sufficient opportunity for previous arrangement, whereas the avocations of the day on which the check is received being already arranged, may materially interfere with the convenience of running from Hyde Park Corner to White Chapel, within the common hours of business.

A discussion recently took place, whether a person taking such a check long after the time of the date, took it subject to the same objections as were applicable to it in the hands of the person from whom he received it, (it having been given as a security for the payment of a bill drawn for the accommodation of the drawers;) it was contended that such a case was analogous to that of a bill payable at a specific time and transferred after it was due. Lord Kenyon in the earlier stages of the cause, resisted this doctrine as fraught with mischievous consequences, but the other judges seemed to be of opinion, that the point at least required consideration, and was open to discussion. Upon further examination it appeared, that the defendants had themselves issued it a considerable time after it bore date. And it was held, that under the particular circumstances it could not have been intended by the drawers that the date should throw any difficulty on the holder. The drawee continued solvent, and payment was stopped by the drawer.—*Boehm v. Sterling*, 7 T. R. 423. The fact was, that the draft was intended to be post-dated, so that the amount might be received at

the time of the accomodation bill becoming due ; but by mistake it was dated as of the current, and not of the succeeding year.

I have already had occasion to take notice of a decision that a check post-dated, having been lost by the owner, and presented for payment before the day of the date ; the owner was entitled to recover it from the banker, such a payment being contrary to the usual course of business.—Esp. N. P. 40.

The checks given by merchants in Liverpool and other commercial places, upon their bankers there, directing them to pay a sum of money in a bill at a given date, have not any legal efficacy, as negotiable instruments, the essence of which is, that they shall be for the payment of money ; but we have seen in the preceding pages, two instances*, in which such checks have become the subject of judicial enquiry, as connected with the discharge of a preceding debt. In one of the cases † it was held, that such a check not being presented in reasonable time, the debt was discharged. The statement of the circumstances was reserved to this place. A broker's clerk in Liverpool received a check of this kind in payment for goods, on the 1st of ———, drawn upon Caldwell and Co. bankers there, and gave a receipt for the amount, expressing it to be paid in a bill at two months *from this day*. The

* Gregson v. Backhouse.—Bolton v. Richard,

† Gregson v. Backhouse.

check was presented on the 2d, and a bill given, *dated* on that day. Bills at two months, drawn by Caldwell on their correspondents, Forbes and Gregory, on the 1st. were paid; but they stopped payment on the day corresponding with the 2d. Different merchants were examined respecting the usage of the place, but their accounts were not exactly uniform. Mr. Justice Lawrence left the question to the jury, whether the presentment was made in a reasonable time, and laid some stress upon the language of the receipt. The jury found a verdict for the defendant.

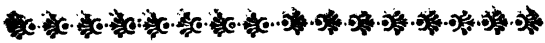
It was held by Lord Thurlow, that a bill being duly taken in pursuance of one of these checks, the drawer and indorser of which afterwards failed; the person who had received the check might recover the deficiency of his original demand, after taking dividend upon their estates.—*Ex parte Dickson*, cited 6 T. R. 142.

III. Bank notes differ from all other instruments which have been mentioned, inasmuch as they are deemed equivalent to cash, for every purpose except that of a tender, specially objected to on this account. And by a temporary act no person can *arrest* his debtor without expressly swearing that there has been no tender in bank notes.

IV. By stat. 15 Geo. c. 51, all promissory notes bills of exchange, or drafts, being negotiable or transferable for the payment of less than 20s. are void, and persons publishing or uttering such

notes, are subject to a penalty of 20*l*. And by 17 Geo. III. all notes, bills, and drafts, under 5*l*. being negotiable or transferable, must specify the names and places of abode of the persons to whom or to whose order they are payable, and must bear date before, or at the time of drawing or issuing thereof, and be payable within twenty one days after the date, and are not afterwards transferable or negotiable. And every indorsement must be made at or before the expiration of that time, and bear date at or before the time of making it, and specify the name and place of abode of the person to whom or to whose order the money is to be paid; the signing and every indorsement must be attested by a subscribing witness. Bills or notes contrary to these directions, are void; and the persons uttering, publishing, or negotiating them, are subject to a penalty of 20*l*.

By temporary acts, founded on the pressure of public credit, the act last mentioned is suspended, so far as it relates to notes payable on demand to the bearer for 1*l*. 1*s*. until the 30th November, 1803—Vi. stat. 32, G. III. c. 107, sec. 8.



CHAP. XXVII.

Of bills and notes as affected by the bankrupt laws.

IT is no part of my plan to discuss the nature of the remedies which the law has provided for the maintenance of the rights and enforcement of the obligations treated of in the preceding chapters. But I think it material to subjoin a few particulars respecting the general subject of the essay, as it is affected by the bankrupt laws: my original intention of comprising every thing relative to bankruptcy in a distinct essay, having been superseded by the valuable publication of Mr. Cullen.

It may be stated as an universal principle, that every person having a right of action upon a bill of exchange, or any of the analogous instruments, has a right to prove his debt under a commission of bankruptcy.

By stat. 5, G. II. ch. 30, creditors by bill, note or other security, payable at a future day, may take out a commission before the day of payment.

A person to whom a bill or note is indorsed after the act of bankruptcy committed, is authorised to take out a commission; the debt subsisting before the act of bankruptcy, though in the person of a different creditor.—*Glaister v Hewer*, 7 T. R. 498.

Expences paid before the bankruptcy may be proved, but not such as are incurred after.

Where different parties to a bill or note have become bankrupts, the holder may prove the full amount against them all, in the same manner as he may proceed in different actions at law, until he has received a complete satisfaction; but if he has received a dividend before he proves, the proof can only be for the balance; and I conceive that in general a dividend must be paid to him for the full amount upon the respective proof, though exceeding 20s. in the pound; and that he is accountable as a trustee for the surplus, to the estate of the party immediately preceding him; for instance, if the holder proves upon the estate of the indorser, and receives 15s. and a dividend is afterwards made on the part of the acceptor of the like amount, he is to receive the 15s. and pay 10s. to the assignees of the indorser, who is only to be ultimately charged with the deficiency of the acceptor. If the dividend of 15s. in the pound is first paid by the acceptor, and afterwards by the indorser, he can only receive the deficiency. It sometimes happens from want of knowledge or attention, that the full dividends are paid on each estate by which the holder obtains an improper benefit.

Where the bankrupt has given a bill for a greater amount than the consideration which he receives, the holder deriving title immediately under him, can only prove to the amount of the consideration actually paid. But the holder has a right

to prove the full amount of the bill against any of the ulterior parties, notwithstanding they have given credit to it without consideration, and he is not restrained in his *proof* to the consideration given by himself; for if a bill is given to him by way of security for a smaller sum, he is entitled to a dividend upon the sum which the bill is drawn for, so as not to receive more than 20s. in the pound upon his real debt. Mr. Cullen proposes the question, whether in a case of accommodation where the estate does not receive the benefit, it would not be more equitable to make the proof commensurate with the real debt. But I rather think the opposite rule is more correct; for a person is induced to give credit by the apparent value of the paper, which he receives as a security, and may not be satisfied with a security, merely commensurate with the extent of the credit. The bankrupt has engaged to the specified amount, that the party received the bill shall not sustain a loss, and that engagement is the fair measure of the demand against his estate. If there is an actual pledge, the creditor has a right to make it available to its full extent, and the credit which is given is in its nature and effects, similar to such a pledge.

If the bill is drawn, &c. for a full value, the holder is entitled to a dividend upon the amount without regard to the consideration given for it by himself. But Mr. Cullen observes, that it should seem that as to all beyond 20s. in the

Ev. U 2

pound for the consideration he gave, he might in some cases be only a trustee for him of whom he received the bill, and as to such surplus the assignees might have the benefit of any set off or counter demand in an account with the latter. The first point included in the preceding observation, must depend upon the question, whether the transfer was by way of sale of the bill, with the chance of profit or loss, or whether the holder may have received it generally in account. There would be no pretence for taking any profit from him in the first case, nor for allowing him more than his real debt in the last. The point respecting a set off seems to be equitable, and supported by fair analogy.

If a bankrupt without putting his name on a bill deposits it by way of pledge; it must, like any other pledge, be sold for the benefit of the creditor, and he can only be admitted to prove for the residue, and cannot in this case, as where the name appears on the bill, prove for the full amount, and receive dividends from all parties until he has obtained 20s. in the pound.

In case an indorser of a bill pays the amount after the bankruptcy of the drawer, acceptor, or prior indorser, his right to prove upon their estates, is a matter upon which there has been supposed to be a contrariety of decisions. But Mr. Cullen shews that there is ground for ascribing the difference of decisions to a difference in the principle of the cases. The distinction according to

His view of the subject is, that where a person merely indorses a bill for the purpose of assisting another in raising money, and is therefore only a surety, his demand only arises by the payment of the money, which, being after bankruptcy, cannot be the subject of a proof; but if he has received the bill upon a real consideration, either mediate or immediate, there is a debt then subsisting, to which his subsequent payment may refer—*Vi. Brookes v. Rogers*, 1 H. B. 640—*Howis v. Wiggins*, 4 T. R. 714—*Ex parte Brymer*—C. B. L. 164—*Ex parte Seddon*, cited, 7 T. R. 575.

Mr. Cullen also observes, that any doubt whether a bill or note negotiated after the bankruptcy may be proved, though the holder was never in possession of it before, may perhaps have proceeded from confounding the debt with the creditor, and that though by construction the statutes are justly supposed to have intended that only such debts as existed before the bankruptcy should be proved under the commission; yet they nowhere say, nor are construed to say, that the person who comes to prove must have had the debt vested in him before the bankruptcy, and they expressly enact that the certificate shall discharge the bankrupt from all debts due or owing by him before that time.

The same circumstances are in general necessary to authorise a proof under a commission of bankruptcy which are requisite in case of an action.

But where all the parties are bankrupts, notice may perhaps be dispensed with. This point was before adverted to in discussing the conduct requisite on the part of the holder of a bill.

The right of proving under a commission, and the effect of barring the debt by a certificate, are in general commensurate. Where a surety pays a debt after the bankruptcy, his debt against the principal arises by such payment, and consequently is not proveable or barred; but where he receives a bill or other security which becomes an absolute debt at law before the bankruptcy, the contrary rule applies. Where the indorser of a bill, taking it up after the bankruptcy may be admitted to prove, he is consequently barred.

But where Peters and Dunlop mutually accepted each other's bills (in which case each bill is regarded as a good consideration for the other). Peters took up his acceptances, and after they both became bankrupts, and the holder of the bills accepted by Dunlop, proved them and received a dividend upon both estates, the court of King's Bench were equally divided upon the question, whether the assignees of Peters were barred by the certificate of Dunlop, from recovering the money paid by them, as they could not have proved it as a debt under the commission in addition to the proof of the holder. *Vi. Cowley v. Dunlop*, 7 T. R. 563.

In case of mutual debts the balance is only to

be paid, therefore a debtor of the bankrupt may set off a bill or note which he holds against him, and is not compellable to pay the whole where he is a debtor, and take a dividend as creditor. But this mutuality must exist at the time of the act of bankruptcy for the state of the bankrupt's effects cannot afterwards be legally changed to the prejudice of the general creditors; and therefore a debtor can only set off bills or notes which he has received previous to the act of bankruptcy, and the proof of such receipt is incumbent upon him. —*Dickson v. Evans*, 6 T. R. 57.

F I N I S.

TABLE OF CONTENTS.

	Page.
INTRODUCTION	2.
<i>Of the general nature and requisites of a bill of exchange</i>	5.
<i>The transfer of bills of exchange</i>	18.
<i>The acceptance of bills of exchange</i>	18.
<i>Acceptance and payment for the honour of the drawer or indorsers.</i>	24.
<i>The time when a bill is payable</i>	31.
<i>The general obligation of the several parties.</i>	33.
<i>Interest, costs and damages, herein and of exchange and re-exchange</i>	39.
<i>The case of a bill being lost</i>	45.
<i>The right of proceeding against the several parties, and of partial payments</i>	48.
<i>The conduct requisite on the part of the holder</i>	51.
<i>Of presenting bills payable at sight or demand for payment; and bills payable at a certain period after sight for acceptance</i>	52.
<i>Notice of refusal to accept</i>	56.
<i>When notice may be dispensed with</i>	59.
<i>Notice of conditional or partial acceptance</i>	64.
<i>Presentment for payment</i>	ib.
<i>Waiving the want of notice</i>	83.
<i>No demand on the drawer of a bill of exchange is necessary to charge the indorser</i>	90.
<i>Protests</i>	
<i>Of objections to the validity of bills and notes.</i>	96.
<i>Illegal considerations and fraud.</i>	ib.
<i>Want of consideration.</i>	103.
<i>Altering a bill</i>	105.
<i>Of passing a bill after it is due.</i>	107.

CONTENTS.

<i>How obligations arising from bills of Exchange may be discharged</i>	108
<i>Of miscellaneous incidents respecting bills and notes</i>	119
<i>The rights acquired by payment of a bill or note</i>	125
<i>Promissory notes</i>	126
<i>Bills or notes payable to bearer, and herein of fictitious payees</i>	133
<i>Bills and notes not payable to bearer or order</i>	139
<i>Bills and notes as affected by the bankrupt laws.</i>	145

Lately Published by the Printer, heretofore,

A

Treatise on Obligations,

CONSIDERED IN A

MORAL AND LEGAL VIEW.



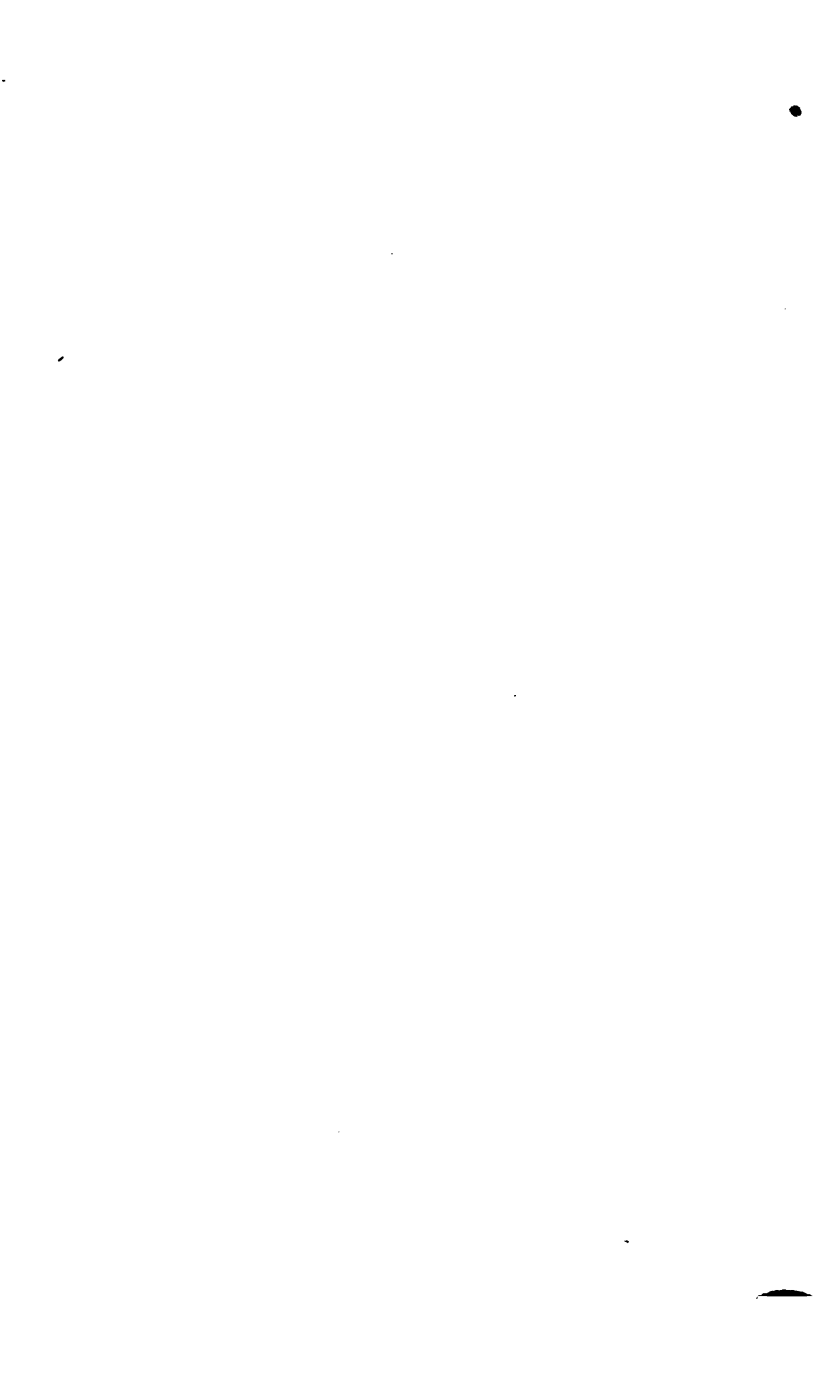
Translated from the French of POTHIER.



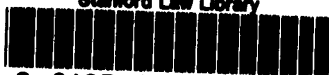
This work is to be had at Messrs. E. Sergeant & Co. New-York, Mathew Carey, and John Conrad & Co. Philadelphia, Conrad, Rapine & Co. Washington, Rosa and Douglas Petersburg, Crow and Query Charleston, A. Hall, Wilmington, Joseph Gales and W. Glendening Raleigh, and most of the principal booksellers in the United States.







CZ AEW XWe
Essays on the action for money
Stanford Law Library



3 6105 044 223 936